

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 66

WESLEY WILLIAM COX, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 17, 1947.

CERTIORARI GRANTED JUNE 9, 1947.

No. 10917

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is *printed and cancelled* herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States,
In and for the District of Idaho,
Eastern Division

No. 2678

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY WILLIAM COX,

Defendant.

INDICTMENT

United States of America
District of Idaho—ss.

COUNT ONE

(50 USCA 305 (2) (g))

P. 319. Also 311, and

Selective Service Reg. 653.12

The Grand Jurors of the United States of America, being first duly empaneled and sworn, in and for the District of Idaho, sitting at Pocatello, Idaho, in the name and by the authority of the United States of America, upon their oath do find and present:

That heretofore, to-wit: on or about the 26th day of May, 1944, in the County of Bannock, State and District of Idaho, Eastern Division, and within the jurisdiction of this Court, the defendant, Wesley William Cox, being then and there an assignee of Civilian Public Service Camp No. 67, Downey, Idaho, did, then and there knowingly, wilfully, unlawfully and feloniously without proper

authority so to do, desert, leave and depart from said Civilian Public Service Camp No. 67.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

S. REED ANDRUS

Foreman of the U. S. Grand
Jury

R. W. BECKWITH

Asst. United States Attorney
for the District of Idaho.

Presented by the Foreman in open court and filed in the presence of the Grand Jury Oct. 17, 1944.

W. D. McReynolds, Clerk. [3]

[Title of District Court and Cause.]

MINUTES OF THE COURT

October 23, 1944

Comes now the District Attorney with the defendant, Wesley William Cox, and his counsel, into Court, this being the time fixed by the Court for the defendant to plead to the Indictment. The Court asked the defendant if he plead guilty or not guilty of the offense charged in the Indictment and the defendant plead not guilty.

The Court fixed 10 o'clock, A. M., on Tuesday, October 24, 1944, to follow Case No. 2677, as time for trial. [4]

[Title of District Court and Cause.]

VERDICT

Filed October 24, 1944

We, the Jury in the above entitled cause, find the defendant Guilty, as charged in the Indictment.

GEO. W. WALTERS

Foreman [5]

In the District Court of the United States

In and for the District of Idaho,

Eastern Division

No. 2678

UNITED STATES OF AMERICA,

Plaintiff,

vs:

WESLEY WILLIAM COX,

Defendant.

JUDGMENT

Filed October 25, 1944

On this 25th day of October, 1944, came the United States Attorney, and the Defendant Wesley William Cox appearing in proper person, and with attorney, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to-wit: Violation Selective Training and Service Act, and the defendant having been now asked whether he has anything to say why

judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered And Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of 3 years and 3 months, and pay a fine of \$300.00, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

CHASE A. CLARK

United States District Judge.

The Court recommends commitment to a penitentiary. [6]

[Title of District Court and Cause.]

TRANSCRIPT

This matter came on for hearing before the Honorable Chase A. Clark, at Pocatello, Idaho, sitting with a jury, on October 24, 1944.

Appearances:

John A. Carver, United States District Attorney

E. H. Casterlin, Assistant United States District Attorney

R. W. Beekwith, Assistant United States District Attorney

All of Boise, Idaho. Attorneys for the Plaintiff

Dellmore Lessard, Portland, Oregon, Attorney for the defendant.

G. C. Vaughan, Reporter [7]

October 24, 1944, 2:30 P.M.

(Jury qualified and selected)

The Court: Mr. Clerk you will read the indictment.

(Whereupon the indictment was read by the clerk).

The Court: You may make your opening statement Mr. Beekwith.

Mr. Beekwith: Ladies and Gentlemen of the Jury, the Government expects to prove that the defendant Wesley William Cox, was duly registered under the selective service and training Act with Local Board number 2 at Medford, Oregon; thereafter that they classified him as 4E and subsequently the Headquarters of the Selective Service designated that he be sent to Civilian Public Service Camp number 67; thereafter the Board ordered him to go to the camp; that he later did go to the camp and very soon thereafter deserted the camp without any authority and continued to remain away from the camp from the date he left about the 26th of May until this time.

The Court: Do you want to make your statement at this time?

Mr. Lessard: Yes, if the Court please. Ladies and Gentlemen of the Jury, the defendant who sits at my left will prove that he was registered with selective service board number two of Jackson county, Oregon; that he asked for a classification of 4D being a minister of the [9] gospel in the sect to which he belongs, Jehovah's witnesses; that he performed the duties of a minister of the gospel in that sect; that he devoted his full time as such; that for that reason he claimed the classification of 4D; that against his will and request the selective service board number 2 of Jackson county, Oregon, classified him as a conscientious objector. He contends that the board acted in excess of their authority and beyond its jurisdiction and contrary to law. For that reason the order of the Board requiring him to report at Downey, Idaho, was void and he was not bound to remain at the camp. This defendant comes before you now for the purpose of determining the question with respect to whether Local Board number 2 of Jackson County, Oregon, committed an error in classifying the defendant.

Mr. Beckwith: I object to the statement of counsel telling that the classification of the defendant was in error, or dealing with the classification of the defendant in any way, by the local board, and his request to be classified as 4D as being incompetent, irrelevant and immaterial to the issues in this case.

The Court: I will let the statement stand and I will instruct the jury as to the law at a later time.

INA ALENDERFER,

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Beckwith:

Q. Will you state your name and residence?

A. Ina Alenderfer, Jackson Board number 2, Medford, Oregon.

Q. What is your occupation?

A. Chief Clerk of Local Board number 2.

Q. Selective Service Board Number 2 of Jackson County, Oregon. A. Yes, sir.

Q. How long have you occupied that position?

A. Ever since the first registration in September 1940.

Q. Is it your official duty to keep all the files and records of the men registered and filed with your board? A. Yes, sir.

Q. Do you keep such record? A. Yes, sir.

Q. Have you the record of Wesley William Cox the defendant in this case? A. Yes, sir.

Q. I wish you would take from that file form 1.

A. Yes, sir.

Q. Handing you plaintiff's Exhibit 1 marked for identification, I will ask you what that is?

A. It is the registrants card, showing that he registered on October 16, 1940. [11]

Q. Is that the registration card of the defendant Wesley William Cox? A. Yes, sir.

Q. Mr. Beckwith: We ask that it be admitted in evidence, at this time.

Mr. Lessard: No objection.

(Testimony of Ina Alenderfer.)

The Court: It may be admitted.

Q. I wish you would take form 40 and form 47 from the file. A. Yes sir.

Q. Handing you exhibit 2 marked for identification I will ask you to examine that and state what it is. A. This is the questionnaire.

Q. Of the defendant? A. Yes sir.

Q. What is exhibit 3 marked for identification?

A. Form 47 is the conscientious objector's form.

Q. Are these exhibits a part of your official records? A. Yes sir.

Mr. Beckwith: We ask that exhibits 2 and 3 be admitted in evidence.

Mr. Lessard: No objection.

The Court: They may be admitted.

Q. Did your Board receive from the National Selective Service Headquarters, a designation of which camp this defendant should be sent to? [12]

A. Yes sir.

Q. Does he have a 4E classification?

A. Yes sir.

Q. Did your Board order him to report for work of national importance? A. Yes sir.

Q. I wish you would take the form you received from National Headquarters designating the camp to which he should be sent?

A. It was the camp in Downey, Bannock County, Idaho.

Mr. Beckwith: I wish to have that marked for identification.

(Testimony of Ina Alenderfer.)

Q. Now; handing you exhibit 5 marked for identification, I will ask you what it is?

A. It is an Assignment To Work Of National Importance.

Q. Will you take from the file the form of Order requiring the defendant to report?

A. Yes sir.

Mr. Beckwith: I ask that this be marked as exhibit 6 for identification.

Q. Handing you exhibit 6 for identification I will ask you what it is?

A. It is an order to report for work of National Importance, the one we sent to him on May 18, 1944.

Q. When was he to report? [13]

A. On May 18th we ordered him to report on the 24th of May.

Q. Did he report? A. Yes sir.

Mr. Beckwith: We offer in evidence now, exhibits 5 and 6.

Mr. Lessard: No objection.

The Court: They may be admitted.

Mr. Beckwith: That is all, you may cross examine.

Cross Examination

By Mr. Lessard:

Mr. Lessard: May I have a few minutes to examine this file?

The Court: Yes, you may. We will recess for ten minutes. (Admonition to the Jury.)

(Testimony of Ina Alenderfer.)

3:05 P.M., Oct. 24, 1944

Q. Miss Alenderfer, the defendant Mr. Cox claimed to be a minister of the gospel.

A. Yes sir, he claims he is.

Q. In what denomination?

A. Jehovah's witnesses.

Q. He submitted documents in proof of his claim?

A. Yes sir.

Q. Which documents you have in the file?

A. Yes sir. [14]

Q. Do you have a letter dated March 17, 1943?

A. Yes sir.

Q. From the defendant?

A. Yes sir.

Q. Do you have another letter dated February 20, 1943?

A. Yes sir.

Q. And do you have a communication from the Watch Tower Bible and Tract Society purporting to be a certificate of ordination?

A. Yes sir.

Q. Dated January 18, 1943?

A. Yes sir.

Q. Do you have a letter dated December 16, 1942?

A. Yes sir.

Q. And a letter attached to two affidavits dated November 11, 1942?

A. Yes sir.

Q. An affidavit dated July 23, 1942?

A. Yes sir.

Q. And a letter dated June 22, 1942?

A. Yes sir.

Mr. Lessard: May we have those marked for identification?

The Court: Yes, they may be marked.

(Testimony of Ina Alenderfer.)

Q. Now showing you defendant's exhibits 7 to 14 inclusive will you tell the Court what these are? [15]

A. They are,—7 is that he applied to be reclassified from 4E to 4D.

Q. They are letters sent to the Board by the defendant or at his direction? A. Yes sir.

Mr. Lessard: We offer these in support of the defendant's claim that he is a minister.

Mr. Beckwith: We object to all of them on the ground that they are incompetent, irrelevant and immaterial to go before this jury to prove any of the issues in this case.

The Court: I will admit them as a part of the records and files of the draft board and later I will instruct the jury as to the law.

Mr. Lessard: In order that the jury may know what they are I will read a portion of one or two of them.

Defendant's exhibit 12 is a certificate from the Watch Tower Bible and Tract Society and reads as follows: "January 18, 1943. To whom it may concern: This is to certify that Wesley W. Cox is one of Jehovah's Witnesses, has been associated with the Watchtower Bible and Tract Society Inc., according to our records since January 1942.

"He was baptized in April 1942 and was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and estab- [16] lishing churches and generally preaching the gospel of the kingdom of God in

(Testimony of Ina Alexander.)

definitely assigned territory on November 2, 1942.

"Mr. Wesley W. Cox's entire time is devoted to missionary work. He has declared himself to be a follower of Christ Jesus and wholly consecrated to do the will of Almighty God. He has taken a course of study in the Bible and Bible helps prescribed by this Society and has shown himself apt to preach and teach this Gospel of the Kingdom. Matthew 24:14.

"He has the Scriptural ordination to preach this Gospel of the Kingdom. Isaiah 61:1, 2. Isaiah 52:7. He is, therefore, declared by this Society a duly ordained minister of the Gospel and is authorized to represent this Society and preach this Gospel of the Kingdom, proclaiming the name of Jehovah God and Christ Jesus, his King" This is signed Watchtower Bible and Tract Society by T. J. Sullivan,—I think those are the initials,—Superintendent of Evangelists, and it is subscribed and sworn to on the 18th day of January 1943 before a Notary public.

Now, a letter from the defendant to Local Board number 9 of Susanville, California dated February 20, 1943 reads as follows: "Local Board No. 9, Susanville, California Gentlemen: I received your order to report for induction in a Public Service Camp on March 9, 1943. At the present time [17] my case is on appeal at National Headquarters of Selective Service, Washington, D. C. I am not a religious objector as the local and state authorities of Oregon have classified me, but I am a minister of the gospel and have filed photostatic copy of my certificate of ordination with them. They refused

(Testimony of Ina Alenderfer.)

to consider this proof, so it was necessary for me to appeal to National Headquarters. I request that you withhold action in my case until a decision is reached by National Headquarters. Respectfully yours, Wesley W. Cox."

Then there is an affidavit signed by Elmer Halbert and it reads as follows: "July 23, 1942. To Whom It May Concern: I, Elmer Halbert, Company Servant of the Ashland Company of Jehovah's Witnesses do hereby affirm and swear that Wesley W. Cox has been connected with our organization six months and that he regularly and customarily serves as a minister by going from house to house and conducting Bible Studies and Bible Talks, and is therefore duly commissioned and ordained by the Almighty God and the Watchtower Bible and Tract Society as a minister of the Gospel as set forth in the Bible in the following scriptures: Isaiah 61; 1,2. 43;9,12. Matthew 10;7,12. 24;14. Acts 20;20. 1 Peter 2;21. 1 Cor. 9;16." Signed Elmer Halbert, and it is subscribed and sworn to before a Notary Public.

And also a letter exhibit 9, from Wesley W. Cox to Local Board No. 1 of Medford, Oregon, dated November 11, 1942, and reads as follows: "Dear Sirs: Find enclosed two [18] affidavits, one by the Company Servant of the Ashland Company of Jehovah's Witnesses, stating that I am an ordained minister and that I do the work of a minister. The other affidavit is a statement showing what classifications I have received from the Local Board, what

(Testimony of Ina Alenderfer.)

classification I claim and the reasons for so claiming, also that I am now in the Pioneer service as a full time publisher of God's Kingdom. Like affidavits have been sent to the Watchtower Bible and Tract Society for filing with National Headquarters for consideration and adding my name to the certified list. I request that you withhold action concerning my case until a decision is reached by National Headquarters." That is signed by Wesley W. Cox and that has attached to it two affidavits setting forth the fact that he is a minister of the gospel in that territory.

We have no further questions of this witness.

Mr. Beckwith: That's all.

ORIN BEECHY,

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Beckwith:

Q. State your name and residence.

A. Orin Beechy, Downey, Idaho.

Q. And your occupation.

A. Camp Director, Civilian Public Service
Camp number 67.

Q. How long have you been director of civilian public service [19] camp 67?

A. Since June 7th.

(Testimony of Orin Beachy.)

Q. This year? A. Yes sir, 1944.

Q. Are you acquainted with a man by the name of Lloyd H. Hess? A. Yes sir.

Q. Was he ever camp director of that camp 67?

A. He was acting camp director.

Q. Was that before you became director?

A. Between the time the other director left and the time that I arrived.

Q. As director of that camp do you have a record of the men at the camp?

A. Yes these files are the records.

Q. Those are the files you are required to keep?

A. Yes sir.

Q. I wish you would take form 50 and form 121 from that file? A. Yes sir.

Q. Now, handing you exhibit marked 15 and also marked 16 for identification, I will ask you to examine and state what they are.

A. Exhibit 15 is an order to report for work of national importance, that is D S S form 50.

Q. Does that show the date the defendant arrived at the camp?

A. Yes, the 26th of May 1944 he arrived.

Q. What is exhibit 16? [20]

A. Exhibit 16 is the form of the National Service Board for religious objectors, it is called form N B S 121.

Q. That is the form on which you report matters to the National headquarters?

A. Yes, sir.

Q. Do these forms you have refer to the de-

(Testimony of Orin Beachy.)

defendant, Wesley William Cox?

A. Yes they do.

Mr. Beckwith: We offer in evidence exhibits 15 and 16.

Mr. Lessard: No objections.

The Court: They may be admitted.

Q. Do you have in your file a letter written by the defendant to the camp director on or about the 26th day of May, 1944?

A. Yes I have a letter written by Wesley W. Cox on the 26th day of May, 1944.

Q. Handing you exhibit 17 marked for identification I will ask you to state what it is?

A. It is a statement of Wesley W. Cox made to Mr. Nebel. However, Mr. Nebel was not there on his arrival and Mr. Lloyd Hess was acting director.

Q. Is that a part of your official file there?

A. Yes, sir.

Mr. Beckwith: We offer in evidence Exhibit 17.

Mr. Lessard: No objection. [21]

The Court: Admitted.

Q. Mr. Beachy, has the defendant been in Civilian Public Service Camp No. 67 since you have been director?

A. Not to my knowledge.

Mr. Beckwith: That is all.

Cross Examination

By Mr. Lessard:

Mr. Lessard: In order that the jury may know the contents of Exhibit 17, which is a letter from the defendant to the camp director, I will read it at this time. "Downey, Idaho, May 26, 1944. Civil-

(Testimony of Orin Beachy.)

ian Public Service Camp No. 67. Downey, Idaho.
Dear Mr. Nebel: By order of local draft board No. 2, Medford, Oregon, I, Wesley William Cox am reporting to this Civilian Public Service Camp.

"Due to the fact that I am a minister of the Gospel, one of Jehovah's Witnesses, I am unable to remain in the camp for the reason that by so doing I would be placing myself in a position where it would be impossible for me to fulfill my commission to preach the Gospel as the Lord has commanded.

"I believe that I have been wrongfully classified by my local board in spite of the fact that I have furnished them conclusive proof of my ministerial status. I am reporting to this camp in compliance with the draft board's orders, and by so doing I am taking the last step in the [22] administrative process under the selective service system. If I am indicted by the Federal Civil Courts for violating the draft law, then by following the procedure outlined in the late Supreme Court's decision in the Billings case, I should be given the opportunity, as a defense to the indictment, to demonstrate the arbitrariness or unfairness of action against me by the local board.

"I am reporting to this camp solely for the purpose of completing the administrative process under the selective service system, in order to secure a review in the courts of my arbitrary classification under the Billings decision. Very truly yours, Wesley W. Cox. To Whom This May Concern: This

(Testimony of Orin Beachy.)

is to certify that Wesley William Cox reported to C. P. S. Camp No. 67, Downey, Idaho, May 26, 1944. Lloyd H. Hess, Acting Camp Director. Dated May 26, 1944."

Mr. Lessard: No questions of this witness.

Mr. Beckwith: That is all, the Government rests.

Mr. Lessard: I desire to make a motion for a directed verdict based on the same grounds as in the previous case and my authorities will be the same.

At this time the defendant moves for a directed verdict of not guilty for the reason that it has not been shown by the Government that the defendant has been correctly classified, in this, that the defendant—strike that—[23] it is not shown that the Government has considered any evidence showing anything to the contrary to the defendant's contention that he is a minister of the gospel or the certificate of ordination or the statement of the company servant that he is a regular minister of the gospel. According to the showing made the draft board has not considered any of these matters, and also that the defendant has shown by letters introduced repeatedly requesting a classification of 4D that he is a minister of the gospel.

The Court: The motion will be denied at this time unless you want to argue it further.

WESLEY WILLIAM COX

being called as a witness on the part of the defend-

(Testimony of Wesley William Cox.)

ant. after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Lessard:

Q. State your name to the jury?

A. Wesley William Cox.

Q. Where do you reside?

A. Ashland, Oregon.

Q. How long have you resided there?

A. Since 1922, in that vicinity.

Q. With whom do you live?

A. With my wife.

Q. How long have you been married? [24]

A. A little over two years.

Q. What is your occupation or business?

A. Minister of the gospel.

Q. How long have you been a minister of the gospel?

A. Since the first part of 1942.

Q. Tell the jury how you happened to become a minister.

Mr. Beckwith: Objected to as incompetent, irrelevant and immaterial.

The Court: Yes, I think it is, but I will let him answer.

A. I became a minister by studying the Bible and Watchtower publications. I have been interested in studying God's work since childhood and I have been interested in being a minister when I saw the truth as set forth in these tracts. I devote all my time to this work. I am still a minister of the gospel; I asked the board to give me that classification so I could carry on the work without

(Testimony of Wesley William Cox.)

hindrance and they have refused.

Mr. Beckwith: I object to this sort of statement.

The Court: Yes, sustained.

Q. What are your duties as a minister?

Mr. Beckwith: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Do you carry on the work usually carried on by a minister? [25]

A. Yes, I do work that is done by ministers. I preach from house to house as the apostles did in Jesus' time. I conduct funerals and I instruct the Bible in homes, that is the way the work is directed—the work of God's kingdom.

Q. Did you ask for a conscientious objector's classification?

A. I claim to be a minister. I filled the conscientious objector's form but I claimed to be a minister.

Q. What classification did you ask for?

A. 4D.

Q. Did you submit proof of your standing as a minister?

A. Affidavits of others that know of my activities; a certificate of ordination from the Watchtower Bible and Tract Society which is recognized by the Selective Service. That is sufficient proof.

Mr. Beckwith: I move to strike the entire answer as incompetent, irrelevant and immaterial.

The Court: I will let it stand.

(Testimony of Wesley William Cox.)

Q. Did you receive an order from the draft board to report at Civilian Service camp at Downey, Idaho, and did you report?

A. I complied with their order. I reported and handed him a letter explaining why I reported so as to exhaust all administrative process.

Q. And did you leave the camp?

A. Within fifteen minutes. [26]

Q. Explain why you left?

A. As I explained in the letter: according to the Billings decision it seemed that I should be given an opportunity to prove the arbitrary and unfair action in classifying me—

Mr. Beckwith: Objected to as incompetent, irrelevant and immaterial, there is no evidence of any arbitrary classification.

The Court: I will instruct the jury as to the law. The answer may stand, I want all the facts to go to the jury.

Mr. Lessard: You may examine.

Cross Examination

By Mr. Beckwith:

Q. You left the camp at Downey without any authority?

A. I left the same day I reported.

Q. Without any authorization from anybody in charge of the camp.

A. That's right.

Q. You have never been back since.

A. No, sir.

Mr. Beckwith: That is all.

Mr. Lessard: That is all.

DORIS COX

called as a witness on the part of the defendant,
after being first duly sworn, testifies as follows:

[27]

Direct Examination

By Mr. Lessard:

Q. State your full name to the jury.

A. Doris Elizabeth Cox.

Q. You are the wife of Wesley William Cox?

A. Yes, sir.

Q. How long have you been married?

A. Two years.

Q. Where do you live?

A. Ashland, Oregon.

Q. What is your religious belief.

A. I am one of Jehovah's Witnesses.

Q. How long have you been a Jehovah Witness.

A. Since 1941.

Q. Do you know whether your husband is recognized by other Jehovah's Witnesses as a minister?

A. He is, and he is recognized by the Watchtower Bible and Tract Society as an ordained minister, they have furnished us with a certificate issued to him.

Mr. Beckwith: Move to strike the answer as incompetent, irrelevant and immaterial.

The Court: It may be stricken.

Mr. Lessard: That's all, you may examine.

Mr. Beckwith: No cross examination.

Mr. Lessard: Defendant rests.

Mr. Beckwith: No rebuttal. [28]

The Court: You may proceed with your argument to the jury.

(Whereupon counsel made their respective argument.)

INSTRUCTIONS

The Court: Ladies and Gentlemen of the Jury: Before you were called upon to serve as trial jurors in this case, a grand jury had returned an indictment against the defendant charging him with the offense of wilfully, knowingly and unlawfully and feloniously and without proper authority so to do, desert, leave and depart from Civilian Public Service Camp No. 67.

The indictment has been read to you and from the reading of the indictment and the evidence introduced in the trial you are familiar with the charge. The indictment is in itself no proof of guilt. It is a mere formal accusation made by the Government against the defendant, charging him with the commission of an offense. The Government thus advises him, in advance of the trial, of the issues he must meet in order that he might prepare his defense, and hence he is not to be prejudiced, nor are you to be influenced by the mere fact that he has been indicted.

The defendant has pleaded "not guilty" which means that he denies the allegations of the indictment.

When you go to your jury room, and indeed during your entire deliberations, you will bear in mind

and be governed by the general rule that the defendant in this case is presumed [29] to be innocent of the offense charged until his guilt is proved by competent evidence beyond a reasonable doubt. The burden is therefore upon the Government to prove the material allegations of the indictment beyond a reasonable doubt.

You will note that the phrase is "reasonable doubt." It is just such a doubt as the term implies, and is one for which you can give a reason. It means a doubt which is reasonable in view of all of the evidence, growing out of the testimony in the case, or the lack of testimony. So generally, I may say, that after you have fairly and impartially considered all the evidence, with a sincere and reasonable effort to reach a conclusion, you can candidly say that you are not satisfied of the defendant's guilt—if you still entertain such a doubt as would cause you to hesitate in the most important affairs of life—then you have a reasonable doubt and your verdict should be for the defendant. But on the other hand, if, after an impartial and earnest consideration and comparison of all the evidence your minds are in such a condition that you truthfully can say that you have an abiding conviction that the charge is true, then you have no reasonable doubt and it becomes your duty to so declare by your verdict.

It frequently becomes necessary for counsel to advise the jury what, in their judgment, the law is. This is in order that they may properly analyze

the evidence in support of their contention, but it is understood that [30] such statements of law given by counsel are not binding upon the jury and you are advised that you must look to the court for the law, and you will accept the instructions of the Court as the law in the case.

You are instructed that the United States Constitution grants no immunity from military service because of religious convictions or activity, but immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objectors and holy calling, and that the term "minister of religion" must be interpreted according to the intent of Congress and not according to the meaning attached to it by members of any particular group.

It is the function of the Selective Service Boards, duly appointed and organized according to law, to classify registrants and to fix the time for their appearance and to assign them according to their classification.

The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

If you find that the Government has proved these allegations then you will find the defendant guilty as charged otherwise you will acquit him. [31]

You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho.

It is necessary in this Court that you all agree in arriving at a verdict. When you retire to your jury room you will elect one of your number as foreman, and when you have arrived at a verdict your foreman alone need sign it, and it will then be returned into open Court.

A verdict has been prepared for your use, and you will insert in the blank space the word "guilty" or the words "not guilty" to conform with your findings.

You will now retire with the bailiffs who will be sworn.

Just a minute before the jury retires. Do you want to take any exceptions. [32]

Mr. Lessard: The defendant excepts to the instructions of the Court to the jury in which the Court withdrew from their consideration any action concerning the classification of the defendant and the unfairness of the classification by the Jackson County Board No. 2.

Also, I didn't have time to prepare an instruction but made my request, and the instruction would be the same as requested in the Thompson case.

The Court: The record may show that the same instruction was requested and refused.

Mr. Lessard: And may we have an exception to that ruling.

The Court: Yes. And now the jury may retire to consider their verdict.

[Endorsed]: Filed Nov. 25, 1944. [33]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant. Wesley William Cox, Star Route, Ashland, Oregon.

Name and Address of Appellant's Attorney. Dellmore Lessard, 505 Corbett Bldg., Portland, Oregon, Offense. Desertion from Civilian Public Service Camp.

Date of Judgment, October 25, 1944.

Brief Description of Judgment or Sentence.

Three years and three months in a Federal Penitentiary to be selected by Attorney General and \$300. fine.

Name of Prison Where Now Confined If Not on Bail. Defendant on \$5000.00 bail.

I, Wesley William Cox, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

1. Denial of motion for a directed verdict of "Not Guilty" at the conclusion of the presentation of the Government's case;

2. Denial of motion for a directed verdict of "Not Guilty" at the conclusion of the trial;

3. Refusal of Trial Court to give requested instruction to the jury;

4. The giving of the Trial Court's instruction to the Jury that they cannot consider irregularities on the part of Jackson County Board No. 2, Selective Service, of the State of Oregon, and withdrawing from the consideration of the jury all consideration of the discrimination of the said draft board against this defendant in refusing to classify him as IV-d, and giving him classification IV-e against his will and without his consent.

5. Denial of the Trial Court of defendant's motion [34] for a judgment of "Not Guilty" notwithstanding the verdict of the jury, or in the alternative for a new trial.

WESLEY W. COX

Appellant

Dated: October 25, 1944.

Received a copy of the above Notice of Appeal this 25th day of October, 1944.

R. W. BECKWITH

Assistant U. S. District Attorney for the District of Idaho.

[Endorsed]: Filed Oct. 25, 1944. [35]

[Title of District Court and Cause.]

SUPERSEDEAS—ORDER

This cause coming on to be heard this 26th day of October, 1944, upon the application of the defendant, Wesley William Cox, for an appeal to the Circuit Court of Appeals of the United States, and said appeal having been allowed:

It Is Ordered that the same shall operate as a supersedeas, the said appellant having executed a bond in the sum of Ten Thousand Dollars (\$10,000.00) as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the United States for the Eastern Division of the District of Idaho until the further order of the court.

Dated this 26th day of October, 1944.

CHASE A. CLARK

District Judge.

[Endorsed]: Filed Oct. 26, 1944. [36]

[Title of District Court and Cause.]

**BAIL BOND ON APPEAL TO UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

State of Idaho,

County of Bannock—ss.

Know All Men By These Presents:

That we, Wesley William Cox, as Principal; and Charles F. Condart, of Idaho Falls, Bonneville County, Idaho, and P. W. Anderson, of Pocatello, Bannock County, Idaho, and Hilda Mark of Pocatello, Bannock County, Idaho, and Floyd Anderson of Pocatello, Bannock County, Idaho, as Sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 26th day of October in the year of our Lord One Thousand Nine Hundred and Forty Four.

Whereas, lately at the fall term, A. D. 1944, of the District Court of the United States for the District of Idaho, Eastern Division and on the 25th day of October, 1944 thereof, in a suit pending in said court between the United States of America, plaintiff, and Wesley William Cox, defendant, a judgment and sentence was rendered against the said Wesley William Cox, and the said Wesley William Cox has filed a Notice of Appeal to the United States Circuit Court of Appeals for the

Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a copy of said Notice of Appeal directed to the United States of America has been duly served, said Notice of Appeal being dated [37] on the 25th day of October, 1944 and service of said Notice of Appeal having been made on the 25th day of October, 1944.

Now, the condition of the above obligation is such, that if the said Wesley William Cox shall appear in the United States Circuit Court of Appeals for the Ninth Circuit on the 1st day of the next term thereof to be held at the City of San Francisco, California or such city as said court may hear the appeal, and from day to day thereafter during said term and from term to term and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

WESLEY WILLIAM COX

Principal

CHARLES F. CONDART

P. W. ANDERSON

HILDA MARK

FLOYD ANDERSON

Sureties [38]

United States of America,

State of Idaho, County of Bannock—ss.

I, Charles F. Condart, a citizen of the State of Idaho, and Obligor in the above undertaking, do solemnly swear that I am a resident of the State of Idaho, in the County of Bonneville; that my post office is in the town of Idaho Falls, Idaho therein, that I own real estate over and above all my debts, liabilities, and exemptions under homestead and appraisement laws to the amount of Ten Thousand Dollars (\$10,000.00) subject to execution in the State of Idaho.

CHARLES F. CONDART.

Subscribed and Sworn to Before me this 26th day of October, 1944.

(Seal)

W. D. McREYNOLDS.

Clerk of U. S. District Court, District of Idaho,
Eastern Division.

I certify that the above Surety is in my opinion sufficient in said case.

(Seal)

W. D. McREYNOLDS.

Clerk of District Court, U. S., District of Idaho,
Eastern Div.

State of Idaho,
County of Bannock—ss.

We, P. W. Anderson, Hilda Mark and Floyd Anderson, are citizens of the State of Idaho, and Obligors in the above undertaking and do solemnly swear that we are residents of the State of Idaho in the County of Bannock, and that our post office is in the town of Pocatello, Idaho therein; that we own real estate over and above all our debts, liabilities and exemptions under homestead and appraisal laws to the amount of \$10,000.00 subject to execution in the State of Idaho.

P. W. ANDERSON

HILDA MARK

FLOYD ANDERSON [39]

Subscribed and Sworn To Before me this 26th day of October, 1944.

(Seal)

W. D. McREYNOLDS.

Clerk of U. S. District Court, Dist. of Idaho, Eastern Div.

I certify that the above Surety is in my opinion sufficient in said case.

(Seal)

W. D. McREYNOLDS.

Clerk of U. S. District Court, Dist. of Idaho, Eastern Div.

Approved as to form only. 10/26/44.

R. W. BECKWITH,

Asst. U. S. Atty.

[Endorsed]: Filed Oct. 26, 1944. [40]

[Title of District Court and Cause.]

**ORDER RELEASING DEFENDANT ON BAIL
PENDING APPEAL**

The defendant, Wesley William Cox, in the above entitled cause, having on the 26th day of October, 1944 filed with the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, his appeal bond in the sum of Ten Thousand Dollars (\$10,000.00), which said bond has been approved by W. D. McReynolds, Clerk of District Court of U. S., for the District of Idaho, Eastern Division as directed by this court, at the time of fixing the bond and the said bond now being approved by the court:

It Is, Therefore Ordered, that the said Defendant, Wesley William Cox, shall be released from custody of the U. S. Marshal for the State of Idaho or such other person as shall have the custody of said defendant, he, the said defendant now being under bond for his appearance pending his appeal.

Dated this 26th day of October, 1944.

CHASE A. CLARK

District Judge.

[Endorsed]: Filed Oct. 26, 1944. [41]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant and appellant, Wesley William Cox, and files the following Assignment of

Errors upon which he is relying on appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

That the Court erred in not permitting the defendant to show, and in not permitting the jury to consider that the order of Selective Service Board No. 2, of Jackson County, Oregon, upon which the indictment herein was based is void, because the defendant is a minister of religion exempt from all duty of training and service, for the reason that it was made (a) in excess of authority of the said board, (b) beyond the jurisdiction of the said board (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution of the United States by depriving defendant of rights and liberty without due process of law, and (h) in violation of the Regulations of Selective Service.

II.

That the Court erred in refusing to grant defendant's motion for a judgment of acquittal, and for a directed verdict, made at the close of all of the evidence.

III.

That the Court erred in charging the jury that it could not consider the illegal and unconstitutional action of Local Selective Service Board No. 2, of Jackson County, Oregon, and in limiting the issue to be decided by the jury as to whether or

not the defendant knowingly deserted the Civilian Public Service Camp. [42]

IV.

The trial Court erred in refusing to submit the requested instruction to the jury permitting the said jury to consider whether or not the local draft board had acted in an illegal and unconstitutional manner in classifying the defendant and in ordering him to report to said CPS Camp.

V.

That the trial Court erred in denying defendants motion for a judgment of "Not Guilty" notwithstanding the verdict of the jury, or in the alternative for a new trial.

VI

That the Court erred in imposing any sentence against the defendant herein.

DELLMORE LESSARD

Attorney for defendant.

Due service accepted this 20th day of November, 1944.

JOHN A. CARVER

United States District Attorney
for the District of
Idaho.

By **R. W. BECKWITH**
Asst. U. S. Atty.

[Endorsed]: Filed Nov. 20, 1944. [43]

[Title of District Court and Cause.]

ORDER

On motion of counsel for the defendant in the above entitled case, and for good cause shown,

It Is Ordered That time for settling and filing Bill of Exceptions on the appeal of the cause be, and the same hereby is, extended to the 18th day of December, 1944.

Dated this 20th day of November, 1944.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed November 20, 1944. [44]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered That the above entitled case came on regularly for trial on Tuesday, October 24, 1944 in the above entitled Court at Pocatello, Idaho, before the Honorable Chase A. Clark, Judge Presiding. A jury having been duly empaneled and sworn to try the issues as by law provided. The United States of America appeared by Messrs. John A. Carver, United States District Attorney, and E. H. Casterlin and R. W. Beckwith, assistants, all of Boise, Idaho. The defendant appeared in person and by his attorney, Dellmore Lessard, of Portland, Oregon.

The appealing defendant respectfully submits the following Bill of Exceptions:

EXCEPTION No. 1

The plaintiff having concluded and rested after submitting all evidence on behalf of the Government, the defendant moved for a directed verdict of "Not Guilty" upon the ground that inasmuch as the defendant had obeyed all administrative processes and orders of Local Selective Service Board No. 2, of Jackson County, Oregon, and had reported to the Civilian Public Service Camp as ordered by said board that it was incumbent upon the Government to prove, and it had failed to prove that the said local board had considered any evidence whatsoever tending to dis-prove defendant's claim to be a minister of the Gospel. That as shown by the evidence introduced on behalf of the Government, the said board has capriciously and arbitrarily given the classification of IV-e (Conscientious Objector) to the defendant after he had informed them that he was not a conscientious objector and did not want said classification. That for said reasons the classification of IV-e having been given to the defendant wrongfully and unlawfully, the order to report to the Civilian Public Service Camp was void, [45] and defendant had committed no crime in failing to obey said order.

But the Court denied defendant's motion, and allowed an exception.

EXCEPTION No. 2

The Court thereupon proceeded with the said trial and after both parties had concluded and submitted their evidence the defendant renewed his

motion for a directed verdict of "Not Guilty" upon the same grounds as set forth in Exception No. 1.

But the Court denied defendant's motion, and allowed an exception.

EXCEPTION No. 3.

That thereafter and before the Court had charged the jury the defendant requested the Court to give an instruction substantially as follows, to-wit:

"The Court instructs you that it is your duty to determine whether or not the defendant is a minister of religion of the sect known as Jehovah's Witnesses, and if you so determine it will be your duty to acquit the defendant because under the law all ministers of religion are exempt from training and service and defendant, if a minister of religion would not be required to report at the Civilian Service Camp as ordered by the Local Selective Service Board No. 2, of Jackson County; Oregon."

That the Court refused to give said charge, and defendant excepted to the Court's ruling.

EXCEPTION No. 4

That the Court thereupon charged said jury, and as part of said charge gave the following:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was as-

signed as set out [46] in the indictment, which has been read to you and which you may take to the jury room.

"If you find that the Government has proved these allegations then you will find the defendant guilty as charged otherwise you will acquit him.

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67 at Downey, Idaho."

To the giving of which charge the defendant excepted.

EXCEPTION No. 5.

The said cause having been submitted to the jury by the Court under its charges, and the jury having deliberated and rendered a verdict against the defendant on October 24, 1944, at the term of Court aforesaid, the defendant made and submitted to the said Court his motion for a judgment notwithstanding the verdict of the jury, and in the alternative for a new trial, on the ground of error committed

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by the Trial Judge at the time of trial in that the Trial Judge refused to give the charge submitted by the defendant, and in that the Trial Judge refused to permit the jury to consider the question of whether or not the order of the Selective Service Board upon which the indictment was based, was void because of defendant's being a minister of religion and exempt from all training and service.

On October 24, 1944 the said motion came on to be heard, and upon consideration of said motion the Court on the same day denied the same, to which ruling the defendant excepted.

In connection herewith there is hereto attached a full [47] transcript of the testimony introduced in this cause, and all exhibits introduced at the said trial, certified by the Official Court Reporter, and made a part of this Bill of Exceptions.

DELLMORE LESSARD

Attorney for defendant and
appellant.

United States of America,
District of Idaho—ss.

It Is Hereby Certified that on the 29th day of November, 1944 the Honorable Chase A. Clark, Judge of the above entitled Court, for good cause shown entered an Order allowing defendant Wesley William Cox, to have to and including December 18, 1944, for settlement and filing of Bill of Exceptions and Assignment of Errors, in respect to the within appeal.

It further appearing that there is attached hereto a full transcript of the testimony offered and all exhibits introduced herein and made a part of this Bill of Exceptions.

It Is Further Certified That the foregoing Exceptions asked and taken by the Defendant, Wesley William Cox, were duly presented within the time fixed by law and the Order of this Court, and the Bill of Exceptions is by me allowed and signed this 14th day of December, 1944.

CHASE A. CLARK

Judge of the District Court of the United States
for the District of Idaho.

United States of America,
District of Idaho—ss.

Due service of the within Bill of Exceptions is hereby accepted in Boise, Idaho, this 11th day of December, 1944, by receiving a copy thereof, duly certified to as such by Dellmore Lessard, attorney for defendant and appellant.

R. W. BECKWITH

Asst. U.S. District Atty.

[Endorsed]: Filed Dec. 14, 1944. [48]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING OF
TRANSCRIPT OF RECORD ON APPEAL

On motion of counsel for the defendant in the above entitled case, and good cause shown,

It Is Ordered That the time for the filing of the Transcript of the Record on Appeal in this cause, be and the same is hereby extended to December 20, 1944.

Dated this 30th day of November, 1944.

CHASE A. CLARK

Judge.

Service of above admitted 11-30-44

R. W. BECKWITH

Asst. U.S. Atty.

[Endorsed]: Filed Nov. 30, 1944. [49]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF
ORIGINAL EXHIBITS

On motion of counsel for the defendant in the above entitled case, and for good cause shown,

It Is Ordered that all of the exhibits herein introduced by both parties hereto be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeal for the Ninth Circuit in their original form.

Dated this 30th day of November, 1944.

CHASE A. CLARK

Judge.

Service of above admitted 11-30-44.

R. W. BECKWITH

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 30, 1944. [50]

[Title of District Court and Cause.]

**STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY
ON APPEAL**

Appellant hereby adopts as his points on appeal the assignments of error heretofore placed on file herein.

Dated at Portland, Oregon this 16th day of December, 1944.

DELLMORE LESSARD

Attorney for defendant and
appellant.

Service of above admitted 12/18/44.

R. W. BECKWITH
Asst. U. S. Atty.

[Endorsed]: Filed Dec. 18, 1944. [51]

[Title of District Court and Cause.]

AMENDED PRAECIPE TO CLERK

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to-wit:

I. Indictment.

2. Record of plea of not guilty.
3. All exhibits.
4. Verdict of jury.
5. Judgment of the Court and sentence.
6. Transcript of testimony.
7. Notice of appeal.
8. Supersedeas—Order.
9. Bail Bond on Appeal.
10. Order releasing defendant on bail pending appeal.
11. Assignment of Errors.
12. Bill of Exceptions.
13. All orders extending time.
14. Statement of points upon which appellant intends to rely.
15. This praeceipe.

Dated at Portland, Oregon this 16th day of December, 1944.

DELLMORE LESSARD

Attorney for defendant and
appellant.

Received a copy of above this 18th day of December, 1944.

R. W. BECKWITH

Asst. U. S. District Atty.

[Endorsed]: Filed Dec. 18, 1944. [52]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT OF
TRANSCRIPT OF RECORD**

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 52, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$6.95, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of December, 1944.

[Seal] W. D. McREYNOLDS
Clerk. [53]

[Endorsed]: No. 10917. United States Circuit Court of Appeals for the Ninth Circuit. Wesley William Cox, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed December 23, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR PRINTING

Appellant hereby adopts as the points upon which he intends to rely on appeal the statement of points appearing in the transcript of the record herein which are the same points as set forth in his Assignment of Errors, also appearing in the transcript herein.

Appellant hereby designates the entire record as

certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for printing in the transcript.

Dated at Portland, Oregon this 3rd day of January, 1944.

DELLMORE LESSARD

Attorney for appellant.

State of Oregon,

County of Multnomah—ss.

I, Dellmore Lessard, being first duly sworn, say: That I am the attorney of record for the appellant in the above entitled cause. That John A. Carver is the United States District Attorney for the District of Idaho, and is the attorney for the appellee herein. That the office of said John A. Carver is U. S. Court House, Boise, Idaho. That there is a regular communication daily by mail between my office in Portland, Oregon and Boise, Idaho. That on the 3rd day of January, 1945 I served a copy of the above by depositing said copy in the post-office at Portland, Oregon, inclosed in a sealed envelope, addressed to said John A. Carver at the address aforementioned, and prepaid the postage thereon.

DELLMORE LESSARD

Sworn to and subscribed before me this 3rd day of January, 1945.

[Seal] **ALBERT A. ASBAHR**

Notary Public for Oregon.

My Com Exp Oct 27, 1947.

[Endorsed]: Filed Jan. 6, 1945. Paul P. O'Brien, Clerk.

No. 10917

IN THE
**United States Circuit Court of Appeals
For the Ninth Circuit**

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals
for the Ninth Circuit •

Excerpt from Proceedings of
Monday, September 17, 1945

Before: Stephens, Healy and Bone, Circuit
Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Dellmore
Lessard, counsel for appellant; and by Mr. E. H.
Casterlin, Assistant United States Attorney, counsel
for appellee, and submitted to the court for con-
sideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Friday, September 27, 1946

Before: Stephens, Healy and Bone, Circuit
Judges.

[Title of Cause.]

**ORDER WITHDRAWING OPINION, SET-
TING ASIDE JUDGMENT AND RESUB-
MITTING CAUSE**

The opinion of this Court heretofore filed on the 5th day of April, 1946, in the above entitled matter is withdrawn. The decision entered in accord with the referred to opinion is hereby set aside. The appeal is hereby submitted to the court for opinion and decision upon the oral argument made and the briefs heretofore filed upon the appeal and upon the briefs heretofore filed on the motion for a rehearing.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Friday October 4, 1946

Before: Stephens, Healy and Bone, Circuit
Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

Wesley William Cox vs.

In the United States Circuit Court of
Appeals for the Ninth Circuit

No. 10,917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 10,928

THEODORE ROMAIN THOMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the District Court of the
United States for the District of Idaho

No. 10,942

Oct. 4, 1946

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon

Before: Stephens, Healy and Bone, Circuit Judges.

Stephens, Circuit Judge.

OPINION

These cases were heretofore decided, but upon petition of the United States this court set aside its decision and withdrew its opinion, and ordered the cases resubmitted upon the original briefs and argument, supplemented by the briefs filed for and against the petition for rehearing.

Wesley William Cox and Theodore Romaine Thompson were indicted by a United States Grand Jury in the District of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U.S.C.A. App. § 311. Wilbur Rosium was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the indictes was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance (§ 309a)

as he should be directed to perform. After various happenings, which we need not here relate, each registrant proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived at camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 305 (d) acts to exempt "regular and duly ordained ministers of religion" from training or service but not from registration.

Appellants' claims as to exemption were at all times consistently, persistently and openly made by each registrant. These claims were the subject of competent proof to the boards through the registrants' questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of religious

training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants, the boards treated their claims as ministers, arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal.

It is settled that the defense in the trial under § 311 upon this phase of the case can only go to the jurisdiction of the board¹ or to the inquiry as to whether or not the board discriminated against the registrant or considered his case arbitrarily or capriciously. While the courts have the power to convict or acquit in accordance with the evidence on these issues, they have no power to try the issue

¹*Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), ... U. S. ...; *Billings v. Truesdell*, 321 U. S. 542 (1944); *Falbo v. United States*, 320 U. S. 549 (1944).

of classification *de novo*. Since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely.

As stated by Mr. Justice Frankfurter in his opinion, concurring in the decision but not in the opinion of the majority of the court in *Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), — U. S. — (1946), the controversial doctrine of jurisdiction of fact, treated in *Crowell v. Benson*, 285 U. S. 22 (1932), is suggested. That is, since ministers of religion are exempted from any service, the registrant under trial for violating § 311 may show the fact to be that he is a minister of religion and not merely that the evidence before the board was in substantial support of the board's classification. It will be recalled that it was decided in the latter case and other similar cases² that findings of fact of an administrative agency which go to the jurisdiction of the agency and which affect constitutional rights are not conclusive and may be tried by the courts *de novo*. Where only statutory rights are involved, as in our cases (ministers of religion have no constitutional rights to exemption from military or other service), the findings of fact

²See *Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Borax, Ltd. v. Los Angeles*, 296 U. S. 10 (1935); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936).

are final if substantially supported by evidence before the agency. See *So. Chicago Co. v. Bassett*, 309 U. S. 251 (1940).³

Finding no error in any one of the three cases treated in this opinion, the judgments are affirmed.
Affirmed.

[Endorsed]: Opinion. Filed Oct. 4, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon appeal from the District Court of the United States for the District of Idaho, Eastern Division.

³See also *Railroad Com'n. v. Rowan & Nichols Oil Co.*, 311 U. S. 570 (1941); *Local Draft Board No. 1 v. Connors* (CCA 9, 1941), 124 Fed. 2d 388; *Gudmundson v. Cardillo* (CCA D. C., 1942), 126 Fed. 2d 521; *Goff v. United States* (CCA 4, 1943), 135 Fed. 2d 610; *United States v. Messersmith* (CCA 7, 1943), 138 Fed. 2d 599.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Eastern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Oct. 4, 1946.

United States of America

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United States Circuit Court of Appeals
Ninth Circuit

No. 10917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA.

No. 10928

THEODORE ROMAIN THOMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA.

Upon Appeal from the United States District Court
for the District of Idaho

No. 10942

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA.

Upon Appeal From the United States District Court
for the District of Oregon

**APPELLANTS' JOINT PETITION FOR
REHEARING**

May It Please the Court:

Now comes the appellants in the above entitled and numbered causes, by and through their counsel, and file and present this their joint petition for rehearing within the time prescribed by the rules of court and enlarged by the order of the court dated October 15, 1946, and pray that the judgments rendered and entered in these cases on October 4, 1946; be vacated and that a rehearing be granted.

The decisions and opinions of this court in these causes dated October 4, 1946, should be withdrawn and the decisions and opinion of this court dated April 5, 1946, should be reinstated and the judgments of the courts below reversed and remanded for new trial for each and every one of the reasons in the opinion of the court dated April 5, 1946. (See page 5 of the slip opinion dated April 5, 1946.)

This action should be taken so that the court's opinion will conform to and comply with the decisions and the opinion of the Supreme Court of the United States dated December 23, 1946, in the cases of Gibson v. United States, and Dodez v. United States (Nos. 23 and 86, October Term 1946) wherein the judgments upon facts and circumstances identical to the facts and circumstances here were reversed and ordered remanded to the trial courts for further pro-

ceedings consistent with the opinion. In its opinion in the Dodez case, the Supreme Court of the United States said:

"This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists, however, that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced, would support no other verdict than one of acquittal and that therefore the trial court should have sustained his motion to dismiss the cause. Accordingly he asks for a judgment here directing that such relief be given.

"In the Estep and Smith cases [327 U. S. 114], after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: 'We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.' 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith. Accordingly we remand the cause, as was done in the Smith and Estep cases, for further proceedings in the trial court, without expressing opinion upon those further issues."

In the Gibson case, the Government argued, as

its ground for affirmance in that case, the same ground that was urged by this court in its opinion dated October 4, 1946. This court said: "Since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely." (See slip opinion page 3.) In the brief for the United States on reargument in *Gibson v. United States*, No. 23, October Term 1946, the Government, inter alia, stated: "Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed on the ground that the information contained in petitioner's selective service file, which he offered in evidence, plainly shows that there was foundation in the facts before the boards for rejecting petitioner's claim to classification as a minister. . . . we think there was ample basis in fact for the boards' rejection of petitioner's claim." (See pages 7-8, 39-56 of Government's brief.)

Instead of affirming the judgment as requested, on the ground that petitioner was not illegally classified and unlawfully denied his claim for exemption, the court reversed the case and remanded Gibson's case to the trial court for a new trial. The court said: "Gibson, like Dodez, and for similar reasons, insists that we should dispose of the case upon the

merits, by examining and sustaining his defense. The same course should be followed for Gibson in this respect as was directed for Dodez. . . . The judgments are reversed and the causes are remanded to the District Courts from which they came, for further proceedings consistent with this opinion." (See *Gibson v. United States*, slip opinion, pp. 22-23.)

This court has held that the judgments should be affirmed because, upon the evidence, it appears that appellants were not illegally classified and denied their claims as ministers of religion within the meaning of the Act and therefore the District Courts did not commit any prejudicial error against appellants when the evidence appearing in the draft board files was excluded from consideration by the courts and juries, or when the courts instructed the juries that they could not consider the alleged illegality of the draft boards' determinations. In other words, this court held that the alleged error in denying appellants due process of law was harmless because appellants would not have been able to establish that the draft boards acted illegally, even if the District Courts had ruled properly.

This holding begs the question. It puts the cart before the horse. If there was denial of due process of law such denial cannot be cured by the finding of this court that appellants were allowed due process of law by the draft boards. Suppose the District Courts had denied appellants the right to counsel. Can it be reasonably said that such denial

could be cured by a finding of this court that appellants had no good defense to the indictments because their draft boards' files showed they were legally classified and therefore guilty of failing to remain at the Civilian Public Service Camps? Suppose the District Courts would have put them to trial upon information rather than indictments. Suppose the courts erroneously overruled a plea of former jeopardy. Suppose appellants were convicted upon confessions illegally obtained, contrary to the Constitution. Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because the draft boards' files showed appellants were legally classified and that they were guilty?

The mere asking of the questions answers with a resounding NO!

Since appellants were denied due process of law, as they claim, then there is only one method whereby that denial can be cured. That is to remand appellants' cases to the trial courts for new trials, so that upon retrials they will have opportunity to make their defenses. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the appellants are admittedly guilty, as the court held here.

The opinion of this court holding that the action of the trial courts, in refusing to consider or to permit the juries to consider the illegality of the

administrative action should not stand. A similar attempt was made by the Fourth Circuit Court of Appeals in *Smith v. United States*, 148 F. 2nd 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case (327 U. S. 114) in the Supreme Court of the United States. The Supreme Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. That Court did not consider the error harmless, as did this court, in its affirmance of the judgments here. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the trial court limited determination of the issues to whether the defendant complied with the order. In these cases the District Courts limited the determination to whether the appellants complied with the orders to remain at the camps. Moreover, in the *Smith* case, as well as in these cases, the trial court did not pass upon the legality of the administrative determination.

If this court can pass upon the validity of the administrative determinations after reviewing the draft board files, then the District Courts should have done so. Inasmuch as the District Courts failed to consider the legality of the administrative determinations, and failed to permit the juries to determine the legality of the administrative actions, the errors, which are denial of due process, cannot be cured by the rationalizing of this court in these cases. In the same way, the error in the *Smith* case

could not be cured by the rationalizing of the court of appeals. *Smith v. United States*, 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by the Supreme Court is best expressed by the last sentence of its opinion in the *Estep and Smith* cases (327 U. S. 114): "Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

If the United States Supreme Court was of the opinion that the performance of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of ministerial work, would be ground for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action, it would have so held in the *Smith* case. It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because this court is of the opinion that the draft boards did not err in making the classification. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error on the ground that the undisputed evidence shows that the defendant is guilty. The effort of this court to hold as harmless error the denial of due process by the District Courts is an effort to use appeal as a trial de novo of the guilt or innocence of appellants.

Only one court has jurisdiction to determine the guilt or innocence of appellants under the indictments and that is the District Court in each case. The failure of the District Courts to exercise judicial function does not authorize this court to reconsider the evidence de novo to determine whether or not appellants are guilty. The District Courts having failed to exercise their function in this regard cannot be exonerated from the violations of the Constitution because this court saw fit to allow appellants a full and fair trial on the alleged illegality of the administrative determination after their convictions. They were entitled to this consideration before conviction.

The holding of this court that, although the defense was available, the appellants' convictions should be affirmed because the draft board proceedings in each case were found to be valid, is an extraordinary departure from due process of law in appeal of criminal cases. The judgments of conviction are invalid because of the denial of the right to be heard in the District Courts on the validity of the draft boards' determinations. The denial of this right entitled appellants to reversals and new trials. The invalidity of the judgments because of the denial of the right, cannot be validated by this court's inquiring into the validity of the draft board proceeding in each case. Once the judgments are invalid the validity cannot be restored by this court's performing the judicial functions that the District Courts refused to perform.

Wherefore, for the reasons stated above, and on account of the arguments appearing in appellants' briefs filed herein and, above all, the reasons stated in this court's opinion filed in these cases on April 5, 1946, and the opinion of the Supreme Court of the United States filed in *Gibson v. United States* and *Dodez v. United States* (Nos. 23 and 86, October Term 1946, decided December 23, 1946); the relief prayed for herein should be granted.

DELLMORE LESSARD,

Corbett Building,

Portland 4, Oregon.

HAYDEN C. COVINGTON,

117 Adams Street,

Brooklyn 1, New York,

Counsel for Appellants.

CERTIFICATE

I, Hayden C. Covington, counsel for appellants, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON,

Counsel for Appellants.

[Endorsed]: Joint petition for rehearing. Filed January 6, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday,
March 20, 1947

Before: Stephens, Healy and Bone, Circuit Judges.

[Title of Cause.]

**ORDER DENYING PETITION FOR
REHEARING**

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed January 6, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED
UNDER RULE 38 OF THE REVISED
RULES OF THE SUPREME COURT OF
THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including 1 to and including 73, to be a full, true and correct copy of the entire record, excluding original exhibits, transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of March, 1947.

[Seal]

PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 9, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. The case is consolidated for argument with Thompson vs. United States and Roisum vs. United States, Nos. 1257 and 1258.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1462)

ORIGINAL COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 67

THEODORE ROMAIN THOMPSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 17, 1947.

CERTIORARI GRANTED JUNE 9, 1947.

No. 10928

United States
Circuit Court of Appeals
For the Ninth Circuit.

THEODORE ROMAINE THOMPSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

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[Clerk's note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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2 *Theodore Romaine Thompson vs.*

In the District Court of the United States,
in and for the District of Idaho,
Eastern Division

No. 2677

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THEODORE ROMAIN THOMPSON,
Defendant.

INDICTMENT

(50 USCA 311)

United States of America,
District of Idaho—ss.

The Grand Jurors of the United States of America, being first duly empaneled and sworn, in and for the District of Idaho, sitting at Pocatello, Idaho, in the name and by the authority of the United States of America, upon their oath do find and present:

That heretofore, to-wit,—on or about the 18th day of April, 1944, in the County of Bannock, State and District of Idaho, Eastern Division, and within the jurisdiction of this Court, the defendant, Theodore Romaine Thompson, being then and there an assignee of Civilian Public Service Camp No. 67, Downey, Idaho, did, then and there, knowingly, wilfully, unlawfully and feloniously, without proper

authority so to do, leave, desert, and depart from said Civilian Public Service Camp No. 67;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

S. REED ANDRUS

Foreman of the United States
Grand Jury.

R. W. BECKWITH

Asst. United States Attorney for the District of
Idaho.

Presented by the Foreman in open court and
filed in the presence of the Grand Jury Oct. 17,
1944. W. D. McReynolds, Clerk. [3]

[Title of District Court and Cause.]

MINUTES OF THE COURT

October 23, 1944

Comes now the District Attorney and the defendant, Theodore Romaine Thompson, and his counsel, into Court, this being the time fixed by the Court for the defendant to plead to the Indictment. The Court asked the defendant if he plead guilty or not guilty of the offense charged in the Indictment, and the defendant plead not guilty.

The Court fixed 10 o'clock A. M., on Tuesday, October 24, 1944, to follow Case No. 2676, as time for trial. [4]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find the defendant Guilty as charged in the Indictment.

NEWELL CALL

Foreman.

[Endorsed]: Filed Oct. 26, 1944. [5]

In the District Court of the United States,
in and for the District of Idaho,
Eastern Division

No. 2677

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE ROMAINE THOMPSON,

Defendant.

JUDGMENT AND SENTENCE

On this 25th day of October, 1944, came the United States Attorney, and the defendant Theodore Romaine Thompson, appearing in proper person, and with counsel, and

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment

in the above-entitled cause, to wit: Violation Selective Training and Service Act of 1940 (50 USCA 311) Desertion from CO Camp and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of three years and three months, and pay a fine of \$300.00, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as a commitment herein.

CHASE A. CLARK

United States District Judge.

The Court recommends commitment to a penitentiary.

[Endorsed]: Filed Oct. 25, 1944. [6]

[Title of District Court and Cause.]

TRANSCRIPT

This matter came on for trial on October 24, 1944, at Pocatello, Idaho, before the Honorable Chase A. Clark, sitting with a jury.

Appearances:

John A. Carver, United States District Attorney

E. H. Casterlin, Assistant United States District Attorney

R. W. Beckwith, Assistant United States District Attorney

All of Boise, Idaho,

Attorneys for Plaintiff.

Dellmore Lessard, Portland, Oregon,

Attorney for the Defendant.

G. C. Vaughan, Reporter. [7]

10 o'clock A. M., October 24, 1944

(Jury qualified and selected)

The Court: You may make your opening statement Mr. Beckwith.

Mr. Beckwith: In this case the Government expects to prove that the defendant Theodore Romaine Thompson was duly registered under the Selective Training and Service Act with Local Board Number 1 at Medford, Oregon; that he was duly classified 4E by the Board and that he was ordered to report for work of National Importance by direction of the National Headquarters of Selective Service; that he was ordered to report to Camp 67 at Downey, Idaho; that he did report to

this camp; that he reported in at Downey Idaho and that about the 18th of April subsequent to reporting in at the camp, he left the camp without authorization and deserted from that camp.

Mr. Lessard: I would like to make my statement at this time.

The Court: Very well, you may make your statement.

Mr. Lessard: Ladies and Gentlemen of the Jury, the defendant will endeavor to prove that he is one of the sect known as Jehovah's Witnesses; that he was registered as stated by the attorney for the Government; that he received a 4E classification, which is the [9] classification given to those who are conscientious objectors and we will attempt to prove that at all times he requested a classification of 4D which is the classification given to ministers; that he is a minister in the Jehovah's Witnesses belief and as such claims to be exempt from training and service under this act. We will prove that he did report at the Downey, Idaho Civilian camp for the purpose of following the law as he saw it under the act; that he exhausted all the administrative process and reported to the camp so that he could have this Court determine whether the Board had committed error and discriminated in giving his that classification.

Mr. Beckwith: I move that the statement of counsel regarding the classification of this defendant and his action in reporting for the purpose of having this Court determine the legality of the action of the Board, be stricken as being incompe-

tent irrelevant and immaterial and not within the issues of this case.

Mr. Lessard: I have been expecting that objection and am prepared to argue it.

(Whereupon the jury was admonished by the Court and excused pending the call of the Bailiff.)

(Argument of counsel.) [10]

The court: At this time I will permit the statement to stand in the record and the Court will take care of the matter as the case progresses. In other words I will reserve ruling on the question as to striking counsel's statement until later in the case.

Mr. Clerk, will you read the indictment.

(Whereupon the indictment was read by the Clerk.)

HELEN RAZUM

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Beckwith:

Q. State your name, residence and occupation?

A. Helen Razum, Medford, Oregon, and I am clerk of Selective Service Board Number 1.

Q. At Medford? A. Yes, sir.

Q. That is Jackson County? A. Yes, sir.

Q. How long have you been clerk of this Board?

A. Since March 9, 1942.

(Testimony of Helen Razum.)

Q. As Clerk of Local Service Board number 1 of Jackson County Oregon, is it your official duty to keep all selective service records affecting the men registered with that Board? [11]

A. Yes, sir.

Q. Did you keep such records?

A. Yes, sir.

Q. Have you the selective service record of the defendant Theodore Romaine Thompson?

A. Yes, sir.

Q. Is he registered with that Board.

A. Yes, sir.

Q. That is, with Local Board Number 1 of Jackson County, Oregon.

A. Yes, sir.

Q. Handing you registration card of this defendant, marked Plaintiff's exhibit 1 for identification, I will ask you to state what that is?

A. That is the registrar's report showing that this man registered on October 16, 1940 at Medford, Oregon.

Mr. Beckwith: I ask to have this admitted in evidence.

Mr. Lessard: I will state that I have no objections to the exhibit, and it might save time to have the whole file introduced in evidence.

The Court: This exhibit may be admitted.

Q. Now take form number 40 from the file and I will ask to have that marked as plaintiff's exhibit 2.

A. Yes, sir.

Q. Handing you what has been marked for iden-

(Testimony of Helen Razum.)

tification as plaintiff's exhibit 2 I will ask you what that is. [12]

A. Selective service questionnaire completed by Mr. Thompson and endorsed on May 27, 1941.

Q. Does that have a record of the classification?

A. A complete record of classification.

Q. What classification has he?

A. 4E now.

Q. Do you have form 47 with you?

A. Yes, sir.

Q. Handing you what has been marked for identification as plaintiff's exhibit 3 I will ask you to state what that is?

A. That is the special form for conscientious objector, that is also endorsed May 27, 1941.

Mr. Beckwith: I ask to have this exhibit admitted in evidence. I also ask that exhibit 2 be admitted.

The Court: If there is no objection, they may both be admitted.

Q. Do you have an order in that file issued by the National headquarters directing what camp Mr. Thompson should be sent to?

A. Yes, sir, that is form D. S. S. 49.

Q. Now, handing you exhibit marked Plaintiff's exhibit 4 for identification, I will ask you to state what it is?

A. That is the assignment to work of national importance.

Q. Concerning Mr. Thompson, the defendant here? [13]

(Testimony of Helen Razum.)

A. Yes, sir, requesting that he be delivered to camp number 67 on April 18, 1944.

Q. And did your Board order that Mr. Thompson report to Civilian Public service camp number 67, at Downey, Idaho?

A. Yes sir, we did.

Q. Have you a copy of the order you sent to him?

A. Yes sir.

Q. Handing you what has been marked for identification as Plaintiff's exhibit 5, I will ask you to state what it is?

A. That is form D S S 50 to report for work of National importance. That is dated March 21, 1944, ordering him to report before our Board on April 16, for transportation.

Mr. Beckwith: We now offer exhibits 4 and 5 in evidence.

The Court: They may be admitted.

Q. Did Mr. Thompson report as required in exhibit 5?

A. Yes sir.

Q. And was he sent to Civilian Camp number 67?

A. Yes, sir.

Q. Do you have the receipt of the camp director to the Order?

A. Yes sir, it is on form number 50.

Mr. Beckwith: That is all, you may examine.

Cross Examination

By Mr. Lessard: [14]

Q. Referring to Government's exhibit 1, the questionnaire—

A. That is exhibit 2.

(Testimony of Helen Razum.)

Q. In this questionnaire on page 5 under series 8 we read concerning the defendant Thompson: "I am a minister of religion. I do customarily serve as a minister. I have been a minister of Jehovah's Witnesses since August 1, 1940. I have been formally ordained. If so, my ordination was performed on August 1, 1940 by Jehovah God and The Watchtower Bible & Tract society, at Medford, Oregon." Did your Board consider that claim of the defendant?

Mr. Beckwith: That is objected to as Incompetent, irrelevant and immaterial.

The Court: Yes, this witness is only an administrative officer and as I take it just the custodian of the records. She has no judicial position and I don't think that she would be entitled to pass on what was the judgment of the Board or what they considered. The only thing she can testify to is what the record shows.

Mr. Lessard: May I ask if she knows?

Mr. Beckwith: That is incompetent, irrelevant and immaterial also.

The Court: You may ask the question.

Q. Do you know if they considered it?

A. I wasn't employed by the Board at that time.

[15]

Q. Referring to the back of this exhibit 2 we find a notation "10/1/43, 4D H H G" and the other looks like "two years" and it has been inked through—

A. —that was entirely by the board.

(Testimony of Helen Razum.)

Mr. Beckwith: I object to that also as incompetent, irrelevant and immaterial.

The Court: If it is not some act of hers I will sustain the objection.

Q. Referring to the file you have various letters written by Mr. Thompson? A. Yes sir.

Q. Letters in which he stated his position in claiming to be a minister. A. Yes sir.

Q. Now will you refer to letter dated November 5, 1943? A. Yes, I have it.

Q. You also have another letter dated November 5, 1943, "To whom it may concern"?

A. Yes sir.

Mr. Lessard: May we have them marked?

Q. You have another communication from a man named Kimmiet dated the 24th of October 1943?

A. We have two dated October 24, 1943.

Mr. Lessard: May we have both of them marked as exhibits? [16]

Q. Now, you have another letter dated July 21, 1941. A. Yes sir.

Mr. Lessard: I would like that to be marked as an exhibit also.

Q. I am showing you exhibits 6, 7, 8, 9 and 10. Will you tell us what those are?

A. Exhibit 6 is a notice of appeal, appealing his classification for a classification of 4D.

Q. Does it state any reason why he is appealing?

A. Yes it—

Mr. Beckwith: —Don't give the reason.

(Testimony of Helen Razum.)

Q. Just tell what the other exhibits are.

A. Exhibit 7 is a certificate signed by twelve different Jehovah's witnesses and I assume that it states the subjects that are studied by ministers and it says that they consider him a minister,—an ordained minister.

Mr. Beckwith: I object to that as she is reading from the instrument. I ask that the answer be stricken.

The Court: It may be stricken.

A. Exhibit 8 is an affidavit signed by Ted Kimmet, Company Servant of Jehovah's witnesses, and exhibit 9 is also an affidavit signed by Ted Kimmet, it is dated October 24, 1943. Exhibit 10 is a notice of appeal dated July 21, 1941.

Q. You also have a photostatic copy of a certificate of [17] ordination from the Watch Tower Bible and Tract Society.

A. I have three photostatic copies of letters here.

Mr. Lessard: I would like to have them marked as exhibits. Now, Your Honor, I offer exhibits 6, 7, 8, 9, 10, 11, 12 and 13 all of which purport to show that the defendant claims to be a minister of the gospel and so informed the draft board and that he claimed a classification 4D.

Mr. Beckwith: We object on the ground that they are not within the issues before the jury. This jury is not sitting as an appeal board.

The Court: I will admit them only as a part of the record and files in this case. I will instruct the jury as to the law.

(Testimony of Helen Razum.)

Mr. Lessard: May I read exhibit 13 or does the witness read the exhibits in this Court.

The Court: It is the custom to stipulate that any part of any exhibit admitted may be read by counsel at any time during the trial.

Mr. Beckwith: I will so stipulate here.

Mr. Lessard: Yes, I will stipulate.

Mr. Lessard: Defendant's exhibit 13 reads as follows: "To Whom It May Concern: This is to certify that Theodore Romaine Thompson of Medford, Oregon, one of Jehovah's Witnesses, has been associated with [18] the Watchtower Bible and Tract Society, according to our records, since 1941, and has been serving as Assistant Company Servant of the Medford, Oregon, Company of Jehovah's Witnesses since October 29, 1942, and Theocratic Ministry instructor since June 1, 1943.

As assistant Company servant, Mr. Thompson assists the Company servant in supervising the activities of the church in their particular territory. He also keeps all the records of the activities of the church and personally conducts Bible studies wherever required throughout the assignment as well as other ministerial duties.

As Theocratic Ministry Instructor, Mr. Thompson has charge of the local school for the instruction of Theocratic ministry in the advanced study of the Bible and Bible subjects.

Mr. Thompson has declared himself to be a follower of Christ Jesus and wholly consecrated to do the will of Almighty God. He has taken a course

(Testimony of Helen Razum.)

of study in the Bible and Bible helps prescribed by this Society and has shown himself apt to preach and teach this Gospel of the Kingdom.

He has the Scriptural ordination to preach this Gospel of the Kingdom. Isaiah 61; 1-2. Isaiah 52; 7. He is, therefore, declared by this Society a duly Ordained Minister of the Gospel and is authorized to represent this [19] Society and preach this Gospel of the Kingdom, proclaiming the name of Jehovah God and Christ Jesus, His King. Signed, Watchtower Bible and Tract Society by J. S. Sullivan, Superintendent of Evangelists.

Subscribed and sworn to before me this 2nd day of November 1943, Willard E. Jackson, Notary Public."

Mr. Beckwith: May the record show that we have an exception to the ruling of the Court on these matters?

The Court: Yes, and you will understand that am admitting these as a part of the records and files of the Selective Service Board and the Jury will be instructed on that matter.

Mr. Lessard: The affidavit of Theodore Kimmet being exhibit 9 reads as follows: "I, Theodore Kimmet, Company servant for Jehovah's Witnesses at Medford, Oregon, do hereby certify that Theodore Romaine Thompson, of 211 W. Jackson, Medford Oregon, is one of Jehovah's Witnesses, that he is an ordained minister of the gospel, and that he regularly engages in preaching the gospel of God's kingdom from house to house, and by calling back

(Testimony of Helen Razum.)

on the people of Good-will to play recorded bible lectures for them, or to conduct Bible studies in the homes of these people of good-will, or to orally instruct them concerning the establishment of the Kingdom of God. Such [20] method of preaching the gospel of the Kingdom is in harmony with the Bible as recorded at Acts 20:20; Mathew 24; 14; Isaiah 61; 1, 2. 1 Peter 2; 21, Isaiah 43; 9-12 and other scriptures.

I further certify that the above named Theodore Thompson is at the present time serving as Assistant Company servant of the Medford Company of Jehovah's Witnesses, and that he is also School Instructor in a course in Theocratic Ministry which is being regularly conducted in the Kingdom Hall, 922 N. Central, Medford. Ted Kimmet, Company servant. Subscribed and sworn to before me this 24th day of October 1943, Elsie L. Knox, Notary Public."

Q.. Now, Miss Razum, do you have in your file any document which tends to show that the defendant Thompson is not a minister of the gospel?

Mr. Beckwith: Objected to as calling for a conclusion of the witness.

The Court: Yes, that would have to be a conclusion.

Q.. Do you have any document denying that Mr. Thompson is a minister of the gospel?

Mr. Beckwith: Objected to for the same reason.

The Court: Sustained. She is called upon to

(Testimony of Helen Razum.)

make this decision. Whether there is such a document.

Mr. Lessard: No further cross examination. [21]

Mr. Beckwith: That is all.

ORIN BEECHY

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Beckwith:

Q. State your name. — A. Orin Beechy.

Q. Your occupation? —

A. Director of Civilian Service Camp number 67.

Q. As director of that camp is it your official duty to keep a record of the men assigned to that camp under the Selective Service and Training Act? A. Yes sir.

Q. Do you keep such a record?

A. Yes sir.

Q. Do you have a record of Theodore Romaine Thompson being assigned to your camp?

A. Yes sir, there was a record in the files.

Q. I wish you would look in the file and report you have there,—refer to form 48 which is the conscientious objector's form.

A. No sir, I don't have form 48.

Q. What form do you have there?

(Testimony of Orin Beechy.)

A. D S S 50.

Q. Have you such a report there? [22]

A. I do.

Q. Handing you what I have had marked as exhibit 14 for identification, I will ask you to state what it is?

A. It is D. S. S. Form 50 an order charging Mr. Thompson to report to Civilian public service camp; with the bottom part of the form filled in that he has reported to the camp.

Mr. Beckwith: We offer that in evidence.

The Court: Admitted if there is no objection.

Q. Were you present at the camp at the time this defendant was there at the camp?

A. No sir, I wasn't.

Q. Who was the director at that time?

A. Mr. Nebel.

Q. He is not the director now?

A. No sir, he is not.

Q. Have you a letter written to Mr. Nebel, by Mr. Thompson dated April 18, 1944?

A. Yes sir.

Q. I will show you what is marked plaintiff's exhibit 15 and ask you what it is?

A. It is a letter written to Mr. Nebel dated April 18, 1944 and signed by T. R. Thompson.

Q. Is that a part of the official records as director? [23].

A. It is a part of the records, yes sir.

Q. Has this defendant been at your camp since you have been director?

(Testimony of Orin Beechy.)

A. Not to my knowledge.

Q. When did you take over the management of the camp? A. June 7, 1944.

Q. You have in your file a report by Dale A. Nebel as camp director dated April 29, 1944 concerning the defendant Mr. Thompson?

A. Yes sir.

Q. Will you let me see that please.

A. Yes sir.

Q. Now, I will ask you to state what exhibit 16 is.

A. It is a report that the director is required to make when anyone leaves the camp without authority.

Q. It is a part of the records of Mr. Thompson? A. That's right.

Mr. Beckwith: I ask to have this admitted as plaintiff's exhibit 16.

Mr. Lessard: No objection.

The Court: Admitted.

Q. I think maybe I asked this question: Has Mr. Thompson been in camp number 67 since you have been there as director?

A. Not to my knowledge.

Mr. Beckwith: That is all. [24]

Cross Examination

By Mr. Lessard:

Q. You were not present at any time Mr. Thompson was at the camp?

A. Not to my knowledge.

(Testimony of Orin Beechy.)

Mr. Lessard: I am not sure about the stipulation as to the reading of exhibits.

The Court: You may read them at any time.

Mr. Lessard: Then I will read exhibit 15 to the jury at this time. It is: "Mr. Dale A. Nebel, Camp Director Civilian Public Service Camp No. 67, Downey Idaho. I Theodore Romaine Thompson, 211 W. Jackson, Medford, Oregon, on this the 18 day of April 1944, am reporting to Civilian Public Service Camp no. 67 at Downey Idaho, as ordered, to do by Local Board No. 1, Jackson County, City Hall, Medford, Oregon, in an order under date of March 21, 1944. However, I cannot remain at the above named camp for the reason that I am a duly ordained Minister of the Gospel and one of Jehovah's Witnesses. As a Minister and a Witness for Jehovah God, I have entered into a covenant to do his will as set forth in his word the Bible. I expressly believe that it is the Will of Jehovah God at this time of the end of the present world, that his servants' preach this gospel of the Kingdom for a witness unto all nations, declare His name, the day of God's vengeance, and comfort those who are now [25] mourning at the distressing conditions in the earth, as set forth at Matthew 24; 14. Isaiah 61; 1, 2. Isaiah 43; 10-12 and other scriptures. To voluntarily lay aside my commission would make me a covenant breaker, worthy of everlasting destruction. Romans 1; 31-32. In refusing to remain at this camp, I am choosing to obey God rather than men. Acts 5; 29.

(Testimony of Orin Beechy.)

I further believe that the Selective Service Authorities have acted unfairly and arbitrarily in refusing to grant me classification 4D that of a duly ordained minister. Yours very truly T. R. Thompson.

To Whom This May Concern: This is to certify that Theodore Romaine Thompson reported to C P S Camp No. 67 Downey, Idaho, on April 18, 1944. Dale A. Nebel, Camp Director. Dated April 18, 1944."

I also wish to read a portion of exhibit 16. After the heading and some printed matter the statement that the assignee did not return to camp but is this day being dropped from our records. Under the heading Statement of assignee: "The assignee is not available at this time for a statement but you will find attached a copy of a letter which was written by him and is dated April 18th, the day he left camp." Under Remarks is the following: "Theodore Romaine Thompson reported to camp late in the forenoon of April 18th. That is the date he was assigned to report to camp. He immediately [26] presented me with a letter, copy attached, stating that he could not remain in camp and stating his reasons for that. He further stated that he intended to leave immediately. We discussed the matter quite thoroughly and I tried to explain the seriousness of such action. He claimed to be aware of the fact that the consequences would not be pleasant. That same afternoon I wrote him a letter asking him to reconsider his decision and

(Testimony of Orin Beechy.)

to think about coming back to camp. Another such letter was written on April 27th. Copies of these letters are attached." This exhibit is dated April 29th. Under the heading Recommendations: "Since the assignee claims to be erroneously classified, I recommend that his case be reviewed before judgment is passed." This is signed by Dale A. Nebel, Camp Director.

Mr. Lessard: No further questions.

Mr. Beckwith: That is our case in chief.

Mr. Lessard: I desire to argue a motion for a directed verdict based upon the same grounds stated before.

The Court: Very well, I will excuse the jury subject to the call of the Bailiff.

Mr. Lessard: May it please the Court, at this time the defendant moves for a directed verdict of not guilty for the reason that it has not been shown by the Government that the defendant has been correctly [27] classified in this, that the defendant,—strike that last,—it is not shown that the Government has considered any evidence showing anything to the contrary to the defendant's contention that he is a minister of the gospel or the certificate of ordination or the statement of the Company Servant that he is a regular minister of the gospel. According to the showing made the draft board has not considered any of these matters, and also that the defendant has shown by letters introduced repeatedly requesting a classification of 4D and that he is a minister of the gospel.

(Argument of counsel.)

The Court: This matter has been well settled by the higher courts. The motion will be denied.

Mr. Lessard: May we have an exception.

The Court: You may have your exception.

THEODORE ROMAIN THOMPSON

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Lessard:

Q. Your full name is Theodore Romain Thompson?
A. Yes sir.

Q. Where do you reside? [28]

A. Medford, Oregon.

Q. How long have you resided there?

A. Five years.

Q. Who do you reside with?

A. My wife Margaret and son John.

Q. How old is your son?

A. Four years old.

Q. How old are you? A. Thirty-four.

Q. Where were you born?

A. Spokane, Washington.

Q. How long did you reside there?

A. We moved to Idaho in 1914, to Deary, Idaho, and there we lived until 1922 and then moved to Troy, Idaho and lived there until 1939.

Q. And then where? A. Medford.

Q. And have resided there since?

(Testimony of Theodore Romaine Thompson.)

A. Yes sir.

Q. What is your occupation?

A. Minister of the gospel is my primary occupation.

Q. For how long have you been a minister of the gospel?

A. Since 1940.

Q. In what sect?

A. I am one of Jehovah's Witnesses. [29]

Q. How did you become a minister?

A. I began studying the publications of the Watchtower Bible and Tract Society together with the bible, and by a diligent study of these books and publications and the sacred scriptures I came to the knowledge of the sacred purpose and then consecrated my life as a minister.

Q. What date in 1940 did you become a minister?

A. August 1940.

Q. What are your duties?

Mr. Beekwith: I object to this as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Now, Mr. Thompson, what classification,—strike that,—did you notify the draft board of your status as a minister?

A. Yes sir.

Q. Did you claim any particular status or classification with the Board?

Mr. Beekwith: Objected as that is a matter of record on form 40.

The Court: He may answer.

A. I claimed the classification of an ordained minister, classification 4D.

(Testimony of Theodore Romaine Thompson.)

Q. The draft board record shows you claimed at one time the classification as a conscientious objector?

A. I did not claim that classification, I filled out the form. [30]

Q. Have you ever claimed that classification?

A. No sir.

Q. Did you ever request that classification?

A. No sir.

Q. Have you ever requested any other classification other than the classification of 4D?

A. No sir, that has been my claim since I filled out the questionnaire.

Q. You are accused with desertion from civilian Public service camp 67.

A. Yes sir.

Q. Tell the jury the facts about that?

A. I was ordered to report to the Civilian Public Service camp after I had exhausted all means I had available to obtain my proper classification. I believe the order to report to the camp was mailed on the 21st of March, ordering me to report on April 16 at Medford, Oregon. Shortly before this time to report I received some information concerning the Falbo decision and also the Billings decision in which decisions the Court had held that the only way I could exhaust my administrative remedies was to carry out the orders of the Local Board, and so on Sunday April 16, I reported to the Board as I was ordered and took the train as I was ordered to Downey, Idaho. I arrived in Downey, Idaho about 11 in the morning of April

(Testimony of Theodore Romaine Thompson.)

18, and then presented the camp director Mr. Nebel with a letter setting forth the reasons that I was [31] reporting to the camp but that I could not remain for the reasons brought out. I remained at the camp for fifteen or twenty minutes. The reason I went to the camp was to exhaust my administrative remedies and not to take the law into my own hands.

Mr. Lessard: You may cross examine.

Cross Examination

By Mr. Beckwith:

Q. These two supreme Court decisions do not hold that you could report to the camp and then desert the camp?

A. I don't know that they did.

Q. You did leave civilian service camp 67 on the 18th day of April 1944? A. Yes sir.

Q. Without any authorization?

A. Other than that I was exhausting my administrative remedies.

Q. You never have been back there?

A. No sir.

Mr. Beckwith: That's all.

Mr. Lessard: That's all, I will call Doris Cox.

DORIS COX

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Lessard:

Q. State your full name? [32]

A. Doris Elizabeth Cox.

Q. Where do you reside?

A. Before I came over here, at Ashland, Oregon.

Q. What is your religious belief?

A. I am one of Jehovah's witnesses.

Q. Are you acquainted with Theodore Romaine Thompson, the defendant?

A. Yes, I have known him since 1942.

Q. Do you know his business or occupation?

A. Since I have known him he has been an ordained minister.

Mr. Lessard: That is all.

Mr. Beckwith: No cross examination.

Mr. Lessard: Defendant rests.

Mr. Beckwith: No rebuttal.

The Court: I think we will recess at this time until 1:30 P. M.

October 24, 1944, 1:30 P. M.

The Court: You may proceed with your argument.

Mr. Lessard: I desire to renew my motion for a directed verdict of not guilty on the same grounds I urged this morning.

The Court: Do you want to present it further?

Mr. Lessard: I would cite the same authorities that I presented this morning. [33]

The Court: The motion will be denied.

Mr. Lessard: May we have an exception?

The Court: Yes.

(Argument to the jury.)

The Court: Ladies and Gentlemen of the Jury: Before you were called upon to serve as trial jurors in this case, a grand jury had returned an indictment against the defendant charging him with the offense of wilfully, knowingly, unlawfully and feloniously evading the requirements of the selective training and service Act of 1940, that is, that he did, without proper authority so to do, leave, desert and depart from Civilian Public Service Camp Number 67.

The indictment has been read to you and from the reading of the indictment and the evidence introduced in the trial you are familiar with the charge. The indictment is in itself no proof of guilt. It is a mere formal accusation made by the Government against the defendant, charging him with the commission of an offense. The Government thus advises him, in advance of the trial, of the issues he must meet, in order that he might prepare his defense, and hence he is not to be prejudiced, nor are you to be influenced by the mere fact that he has been indicted.

The defendant has pleaded "not guilty" which means [34] that he denies the allegations of the indictment.

When you go to your jury room, and indeed during your entire deliberations, you will bear in mind and be governed by the general rule that the defendant in this case is presumed to be innocent

of the offense charged until his guilt is proved by competent evidence beyond a reasonable doubt. The burden is therefore upon the Government to prove the material allegations of the indictment beyond a reasonable doubt.

You will note that the phrase is "reasonable doubt". It is just such a doubt as the term implies, and is one for which you can give a reason. It means a doubt which is reasonable in view of all of the evidence, growing out of the testimony in the case, or the lack of testimony. So generally, I may say, that after you have fairly and impartially considered all the evidence, with a sincere and reasonable effort to reach a conclusion, you can candidly say that you are not satisfied of the defendant's guilt,—if you still entertain such a doubt as would cause you to hesitate in the most important affairs of life, then you have a reasonable doubt and your verdict should be for the defendant. But on the other hand, if, after an impartial and earnest consideration and comparison of all the evidence your minds are in such a condition that you truthfully can say that you have an abiding conviction [35] that the charge is true, then you have no reasonable doubt and it becomes your duty to so declare by your verdict.

It frequently becomes necessary for counsel to advise the jury what, in their judgment, the law is. This is in order that they may properly analyze the evidence in support of their contention, but it

is understood that such statements of the law given by counsel are not binding upon the jury, and you are advised that you must look to the Court for the law, and you will accept the instructions of the Court as the law in the case.

You are instructed that the United States Constitution grants no immunity from military service because of religious convictions or activity, but immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objectors and holy calling, and that the term "minister or religion" must be interpreted according to the intent of Congress and not according to the meaning attached to it by members of any particular group.

It is the function of the Selective Service Boards, duly appointed and organized according to law, to classify registrants and to fix the time for their appearance and to assign them according to their classification.

The Government must prove the material allegations of the indictment; that the defendant was duly registered by a local Board under the Selective Service and training [36] Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

If you find that the Government has proved these

allegations then you will find the defendant guilty as charged, otherwise you will acquit him.

You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is,—that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67.

It is necessary in this Court that you all agree in arriving at a verdict. When you retire to your jury room you will elect one of your number as foreman, and when you have arrived at a verdict your foreman alone need [37] sign it, and it will then be returned into Open Court.

A verdict has been prepared for your use and you will insert in the blank space the word 'guilty' or the words 'not guilty' to conform with your finding.

Before the jury retires is there any exception you want in the record.

Mr. Lessard: I wish to make a couple of objections. The defendant objects to the Court's refusal

to give the defendant's requested Instruction to the jury. Also the defendant excepts to the withdrawing from the consideration of the jury any action of the Jackson County, Oregon, Selective Service Board number 1.

The Court: Overruled. The jury may now retire to consider their verdict.

[Endorsed]: Filed Nov. 25, 1944. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant. Theodore Romaine Thompson, 211 W. Jackson St., Medford, Oregon.

Name and Address of Appellant's Attorney. Dellmore Lessard, 505 Corbett Bldg., Portland, Oregon.

Offense. Desertion from Civilian Public Service Camp.

Date of Judgment. October 25, 1944.

Brief Description of Judgment or Sentence. Three years and three months in a Federal Penitentiary to be selected by the Attorney General and \$300. fine.

Name of Prison where now Confined if not on Bail. Defendant on \$5000.00 bail.

I, Theodore Romaine Thompson, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from

the judgment above-mentioned on the grounds set forth below.

1. Denial of motion for a directed verdict of "Not Guilty" at the conclusion of the presentation of Government's case;

2. Denial of motion for directed verdict of "Not Guilty" at the conclusion of the trial;

3. Refusal of Trial Court to give requested instruction to the jury;

4. The giving of the Trial Court's instruction to the jury that they cannot consider irregularities on the part of Jackson County Board No. 1, of the State of Oregon, and withdrawing from the consideration of the jury all consideration of the discrimination of the said draft board against this defendant in refusing to classify him as IV-d, and giving him classification IV-e against his will and without his request;

5. Denial of the Trial Court of defendant's motion for a judgment of "Not Guilty" notwithstanding the verdict of [39] the jury, or in the alternative for a new trial.

T. R. THOMPSON

Appellant

Dated: October 25, 1944.

Received a copy of the above Notice of Appeal this 25th day of October, 1944.

R. W. BECKWITH

Asst. U.S. Atty.

[Endorsed]: Filed Oct. 25, 1944. [40]

[Title of District Court and Cause.]

SUPERSEDEAS — ORDER

This cause come on to be heard this 26th day of October, 1944, upon the application of the defendant, Theodore Romaine Thompson, for an appeal to the Circuit Court of Appeals of the United States, and said appeal having been allowed;

It Is Ordered that the same shall operate as a supersedeas, the said appellant having executed a bond in the sum of Ten Thousand Dollars (\$10,000.00) as provided by law, and the Clerk is hereby directed to stay the mandate of the District Court of the United States for the Eastern Division of the District of Idaho until the further order of the court.

Dated this 26th day of October, 1944.

CHASE A. CLARK

District Judge.

[Endorsed]: Filed Oct. 26, 1944. [41]

[Title of District Court and Cause.]

**BAIL BOND ON APPEAL TO UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

State of Idaho

County of Bannock—ss.

Know All Men By These Presents:

That we, Theodore Romaine Thompson, as Principal; and Charles F. Condart, of Idaho Falls, Bon-

neville County, Idaho, and P. W. Anderson, of Pocatello, Bannock County, Idaho, and Hilda Mark of Pocatello, Bannock County, Idaho, and Floyd Anderson of Pocatello, Bannock County, Idaho, as Sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 26th day of October in the year of our Lord One Thousand Nine Hundred and Forty Four.

Whereas, lately at the fall term, A.D. 1944, of the District Court of the United States for the District of Idaho, Eastern Division and on the 25th day of October 1944 thereof, in a suit pending in said court between the United States of America, plaintiff, and Theodore Romaine Thompson, defendant, a judgment and sentence was rendered against the said Theodore Romaine Thompson, and the said Theodore Romaine Thompson has filed a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a copy of said Notice of Appeal directed to the United States of America has been duly served, said Notice of Appeal being dated [42] on the 25th day of October, 1944, and service of said Notice of Appeal having been made on the 25th day of October, 1944.

Now, the condition of the above obligation is such, that if the said Theodore Romaine Thompson shall appear in the United States Circuit Court of Appeals for the Ninth Circuit on the 1st day of the next term thereof to be held at the city of San Francisco, California or such city as said court may hear the appeal, and from day to day thereafter during said term and from term to term and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrendered himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

**THEODORE ROMAINÉ
THOMPSON**

Principal

CHARLES F. CONDART

P. W. ANDERSON

HILDA MARK

FLOYD ANDERSON

Sureties [43]

United States of America

State of Idaho, County of Blaine—ss.

I, Charles F. Condart, a citizen of the State of Idaho, and Obligor in the above undertaking, do

solemnly swear that I am a resident of the State of Idaho, in the County of Bonneville; that my post office is in the town of Idaho Falls, Idaho therein; That I own real estate over and above all my debts, liabilities, and exemptions under homestead and appraisement laws to the amount of Ten Thousand Dollars (\$10,000.00) subject to execution in the State of Idaho.

CHARLES F. CONDART

Subscribed And Sworn To Before me, this 26th day of October, 1944.

[Seal]

W. D. McREYNOLDS

Clerk of U. S. District Court, District of Idaho,
Eastern Division.

I certify that the above Surety is in my opinion sufficient in said case.

[Seal]

W. D. McREYNOLDS.

Clerk of District Court, U.S., Dist. of Idaho, Eastern Div.

State of Idaho
County of Bannock—ss.

We, P. W. Anderson, Hilda Mark and Floyd Anderson, are citizens of the State of Idaho, and Obligors in the above undertaking and do solemnly swear that we are residents of the State of Idaho in the County of Bannock, and that my post office is in the town of Pocatello, Idaho therein; that we own real estate over and above all our debts, liabilities

and exemptions under homestead and appraisement laws to the amount of \$10,000.00 subject to execution in the State of Idaho.

P. W. ANDERSON

HILDA MARK

FLOYD ANDERSON [44]

Subscribed And Sworn To Before me this 26th day of October, 1944.

[Seal]

W. D. McREYNOLDS.

Clerk of U.S. District Court, District of Idaho,
Eastern Div.

I certify that the above Surety is in my opinion sufficient in said case.

[Seal]

W. D. McREYNOLDS.

Clerk of U.S. District Court, District of Idaho,
Eastern Div.

Approved as to form only, 10/26/44.

R. W. BECKWITH.

Asst. U. S. Atty.

[Endorsed]: Filed Oct. 26, 1944. [45]

[Title of District Court and Cause.]

**ORDER RELEASING DEFENDANT ON BAIL
PENDING APPEAL**

The defendant, Theodore Romaine Thompson, in the above entitled cause, having on the 26th day of October, 1944 filed with the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, his appeal bond in the sum of Ten

Thousand Dollars (\$10,000.00), which said bond has been approved by W. D. McReynolds, Clerk of District Court of U.S., for the District of Idaho, Eastern Division as directed by this court, at the time of fixing the bond and the said bond now being approved by the court;

It Is Therefore, Ordered, that the said Defendant, Theodore Romaine Thompson, shall be released from custody of the U.S. Marshal for the State of Idaho or such other person as shall have the custody of said defendant he, the said defendant, now being under bond for his appearance pending his appeal.

Dated this 26th day of October. 1944,

CHASE A. CLARK

District Judge.

[Endorsed]: Filed Oct. 26, 1944. [46]

[Title of District Court and Cause.]

• ASSIGNMENT OF ERRORS

Comes now the defendant and appellant, Theodore Romaine Thompson, and files the following Assignment of Errors upon which he is relying on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I.

That the Court erred in not permitting the defendant to show, and in not permitting the jury to consider that the order of the Selective Service Board No. 1, of Jackson County, Oregon, upon

which the indictment herein was based is void, because the defendant is a minister of religion exempt from all duty of training and service, for the reason that said order was made (a) in excess of the authority of said board, (b) beyond the jurisdiction of the said board (c) contrary to the law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrary and capriciously, (g) contrary to the Constitution of the United States by depriving defendant of rights and liberties without due process of law, and (h) in violation of the Regulations of Selective Service.

II.

That the Court erred in refusing to grant defendant's motion for a judgment of acquittal, and the defendant knowingly deserted the Civil Public the evidence.

III.

That the Court erred in charging the jury that it could not consider the illegal and unconstitutional action of Local Selective Service Board No. 2, of Jackson County, Oregon, and in limiting the issue to be decided by the jury as to whether or not defendant knowingly deserted the Civil Public Service Camp.

IV.

That the trial Court erred in refusing to submit the [47] requested instruction to the jury permitting the jury to consider whether or not the local draft board had acted in an illegal and unconstitutional manner in classifying the defendant and in ordering him to report to said CPS Camp.

V.

That the trial Court erred in denying the defendant's motion for a judgment of "Not Guilty" notwithstanding the verdict of the jury, or in the alternative for a new trial.

VI.

That the Court erred in imposing any sentence against the defendant herein.

DELMORE LESSARD

Attorney for defendant

Due service accepted this 20th day of November, 1944.

JOHN A. CARVER

United States District Attorney for the District of Idaho.

By R. W. BECKWITH

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 20, 1944. [48]

[Title of District Court and Cause.]

ORDER

On motion of counsel for the defendant in the above entitled case, and for good cause shown,

It Is Ordered That time for settling and filing Bill of Exceptions on the appeal of the cause be,

and the same hereby is, extended to the 18th day of December, 1944.

Dated this 20th day of November, 1944.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed Nov. 20, 1944. [49]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered That the above entitled case came on regularly for trial on Tuesday, October 24, 1944 in the above entitled Court at Pocatello, Idaho, before the Honorable Chase A. Clark, Judge Presiding. A jury having been duly empaneled and sworn to try the issues as by law provided. The United States of America appeared by Messrs. John A. Carver, United States District Attorney, and E. H. Casterlin and R. W. Beckwith, assistants, all of Boise, Idaho. The defendant appeared in person and by his attorney, Dellmore Lessard, of Portland, Oregon.

The appealing defendant respectfully submits the following Bill of Exceptions:

EXCEPTION No. 1

The plaintiff having concluded and rested after submitting all evidence on behalf of the Government, the defendant moved for a directed verdict of "Not Guilty" upon the ground that inasmuch as the defendant had obeyed all administrative proc-

esses and orders of the Local Selective Service Board No. 1 of Jackson County, Oregon, and had reported to the Civilian Public Service Camp as ordered by said board, that it was incumbent upon the Government to prove, and it had failed to prove, that the said local board had considered any evidence whatsoever tending to disprove defendant's claim to be a minister of religion. That as shown by the evidence introduced on behalf of the Government, the said board capriciously and arbitrarily gave the classification of IV-e (Conscientious Objector) to the defendant after he had informed them that he was not a conscientious objector and did not want said classification. That for said reasons the classification of IV-e having been given to the defendant wrongfully and unlawfully, the order to report to the Civilian Public Service Camp was void, [50] and defendant had committed no crime in failing to obey said order.

But the Court denied defendant's motion, and allowed an exception.

EXCEPTION No. 2

The Court thereupon proceeded with said trial, and after both parties had concluded and submitted their evidence the defendant renewed his motion for a directed verdict of "Not Guilty" upon the same grounds as set forth in Exception No. 2,

But the Court denied defendant's motion, and allowed an exception.

EXCEPTION No. 3

That thereafter and before the Court had charged the jury the defendant requested the Court to give an instruction substantially as follows, to-wit:

"The Court instructs you that it is your duty to determine whether or not the defendant is a minister of religion of the sect known as Jehovah's Witnesses, and if you so determine it will be your duty to acquit the defendant because under the law all ministers of religion are exempt from training and service, and the defendant, if a minister of religion would not be required to report at the Civilian Public Service Camp as ordered by the Local Selective Service Board No. 1, of Jackson County, Oregon."

That the Court refused to give said charge, and the defendant excepted to the Court's ruling.

EXCEPTION No. 4

That the Court thereupon charged the jury, and as a part of said charge gave the following:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the [51] jury room.

"If you find that the Government has proved

these allegations then you will find the defendant guilty as charged otherwise you will acquit him."

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67 at Downey, Idaho."

To the giving of which charge the defendant excepted.

EXCEPTION No. 5

The said cause having been submitted to the jury by the Court under its charges, and the jury having deliberated and rendered a verdict against the defendant on October 24, 1944, at the term of Court aforesaid, the defendant made and submitted to the said Court his motion for a judgment notwithstanding the verdict of the jury, and in the alternative for a new trial, on the ground of error committed by the Trial Judge at the time of trial in that the Trial Judge refused to give the charge submitted by the defendant, and in that the Trial Judge refused to permit the jury to consider the

question of whether or not the order of the Selective Service Board upon which the indictment was based, was void because of defendant's being a minister of religion and thereby exempt from all training and service under the Selective Service and Training Act.

On October 24, 1944 the said motion came on to be heard, and upon consideration of said motion the Court on the same day denied the same, to which ruling the defendant excepted.

In connection herewith there is hereto attached a full transcript of the testimony introduced in this cause, and all exhibits introduced [52] at the said trial, certified by the Official Court Reporter, and made a part of this Bill of Exceptions.

DELLMORE LESSARD

Attorney for defendant and
appellant.

United States of America,
District of Idaho—ss.

It Is Hereby Certified That on the 29th day of November, 1944 the Honorable Chase A. Clark, Judge of the above entitled Court, for good cause shown entered an Order allowing defendant Theodore Romaine Thompson, to have to and including December 18, 1944, for settlement and filing of Bill of Exceptions and Assignment of Errors, in respect to the within appeal.

It further appearing that there is attached hereto a full transcript of the testimony offered and all exhibits introduced herein and made a part of this Bill of Exceptions.

It Is Further Certified That the foregoing Exceptions asked and taken by the defendant, Theodore Romaine Thompson, were duly presented within the time fixed by law and the Order of this Court, and the Bill of Exceptions is by me allowed and signed this 14th day of December, 1944.

CHASE A. CLARK

Judge of the District Court of the United States
for the District of Idaho.

United States of America,
District of Idaho—ss.

Due service of the within Bill of Exceptions is hereby accepted in Boise, Idaho, this 11th day of December, 1944, by receiving a copy thereof, duly certified to as such by Dellmore Lessard, attorney for defendant and appellant.

R. W. BECKWITH

Asst. U. S. District Atty.

[Endorsed]: Filed Dec. 14, 1944. [53]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME FOR FILING OF
TRANSCRIPT OF RECORD ON APPEAL**

On motion of counsel for the defendant in the above entitled case, and good cause shown,

It Is Ordered That the time for the filing of the

Transcript of the Record on Appeal in this cause,
be and the same is hereby extended to December
30, 1944.

Dated this 30th day of November, 1944.

CHASE A. CLARK

Judge.

Service of above admitted 11/30/44.

R. W. BECKWITH

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 30, 1944. [54]

[Title of District Court and Cause.]

**ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS**

On motion of counsel for the defendant in the
above entitled case, and for good cause shown,

It Is Ordered That all of the exhibits herein in-
troduced by both parties hereto be transmitted by
the Clerk of this Court to the Clerk of the United
States Circuit Court of Appeals for the Ninth Cir-
cuit in their original form.

Dated this 30th day of November, 1944.

CHASE A. CLARK

Judge.

Service of above admitted 11/30/44.

R. W. BECKWITH

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 30, 1944. [55]

[Title of District Court and Cause.]

**STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL.**

Appellant hereby adopts as his points on appeal the assignments of error heretofore placed on file herein.

Dated at Portland, Oregon this 16th day of December, 1944.

DELLMORE LESSARD

Attorney for defendant and
appellant.

Service of above admitted 12/18/44.

R. W. BECKWITH

Asst. U. S. Atty.

[Endorsed]: Filed Dec. 18, 1944. [56]

[Title of District Court and Cause.]

AMENDED PRAECIPE TO CLERK.

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to-wit:

1. Indictment.
2. Record of plea of not guilty.
3. All exhibits.

4. Verdict of jury.
5. Judgment of Court and sentence.
6. Transcript of testimony.
7. Notice of appeal.
8. Supersedeas—Order.
9. Bail Bond on appeal.
10. Order releasing defendant on bail pending appeal.
11. Assignment of Errors.
12. Bill of Exceptions.
13. All orders extending time.
14. Statement of points upon which appellant intends to rely.
15. This praecipe.

Dated at Portland, Oregon this 16th day of December, 1944.

DELLMORE LESSARD

Attorney for defendant and
appellant.

Received a copy of the above this 18th day of
December, 1944.

R. W. BECKWITH

Asst. U. S. District Atty.

[Endorsed]: Filed Dec. 18, 1944. [57]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 57, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$6.95, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of December, 1944.

(Seal)

W. D. McREYNOLDS
Clerk. [58]

[Endorsed]: No. 10928. United States Circuit Court of Appeals for the Ninth Circuit. Theodore Romaine Thompson, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed December 23, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10928

THEODORE ROMAIN THOMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR PRINTING

Appellant hereby adopts as the points upon which he intends to rely on appeal, the statement of points appearing in the transcript of the record herein, which are the same points as set forth in his Assignment of Errors, also appearing in the transcript herein.

Appellant hereby designates the entire record as

certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for printing in the transcript.

Dated at Portland, Oregon this 3rd day of January, 1945.

DELLMORE LESSARD

Attorney for appellant.

State of Oregon,

County of Multnomah—ss.

I, Dellmore Lessard, being first duly sworn, say: That I am the attorney of record for the appellant in the above entitled cause. That John A. Carver is the United States District Attorney for the District of Idaho, and is the attorney for the appellee herein. That the office of said John A. Carver is U. S. Court House, Boise, Idaho. That there is a regular communication daily by mail between my office in Portland, Oregon and Boise, Idaho. That on the 3rd day of January, 1934, I served a copy of the above by depositing said copy in the post-office at Portland, Oregon, inclosed in a sealed envelope, addressed to said John A. Carver at the address aforesaid, and prepaid the postage thereon.

DELLMORE LESSARD

Sworn to and subscribed before me this 3rd day of January, 1945.

[Seal]

ALBERT A. ASBAHR

Notary Public for Oregon.

My Com. Exp. Oct. 27, 1947.

[Endorsed]: Filed Jan. 6, 1945. Paul P. O'Brien, Clerk.

No. 10928

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

THEODORE ROMAIN THOMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

**Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday,
September 17, 1945

Before: Stephens, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Dellmore Lessard, counsel for appellant, and by Mr. E. H. Casterlin, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday,
September 27, 1947

Before: Stephens, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER WITHDRAWING OPINION, SETTING
ASIDE JUDGMENT AND RESUBMIT-
TING CAUSE

The opinion of this Court heretofore filed on the
5th day of April, 1946, in the above entitled matter

is withdrawn. The decision entered in accord with the referred to opinion is hereby set aside. The appeal is hereby submitted to the court for opinion and decision upon the oral argument made and the briefs heretofore filed upon the appeal and upon the briefs heretofore filed on the motion for a rehearing.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday,
October 4, 1946

Before: Stephens, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT.

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 10,928

THEODORE ROMAINE THOMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the District Court of
the United States for the District of Idaho

No. 10,942

Oct. 4, 1946

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of
the United States for the District of Oregon

Before: Stephens, Healy and Bone,
Circuit Judges.

Stephens, Circuit Judge.

OPINION

These cases were heretofore decided, but upon petition of the United States this court set aside its decision and withdrew its opinion and ordered the cases resubmitted upon the original briefs and argument, supplemented by the briefs filed for and against the petition for rehearing.

Wesley William Cox and Theodore Romaine Thompson were indicted by a United States Grand Jury in the District of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U.S.C.A. App. § 311. Wilbur Roisum was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the inditees was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance

(§ 309a) as he should be directed to perform. After various happenings, which we need not here relate, each registrants proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived at camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby the registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 305(d) acts to exempt "regular and duly ordained ministers of religion" from training or service but not from registration.

Appellants' claims as to exemption were at all times consistently, persistently and openly made by each registrant. These claims were the subject of competent proof to the boards through the registrants' questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of

religious training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants, the boards treated their claims as ministers, arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal.

It is settled that the defense in the trial under § 311 upon this phase of the case can only go to the jurisdiction of the board¹ or to the inquiry as to whether or not the board discriminated against the registrant or considered his case arbitrarily or capriciously. While the courts have the power to convict or acquit in accordance with the evidence on these issues, they have no power to try the issue of classification de novo. Since in each case under

¹Estep v. United States (No. 292) and Smith v. United States (No. 66), U.S.; Billings v. Truesdell, 321 U.S. 542 (1944); Falbo v. United States, 320 U.S. 549 (1944).

treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely.

As stated by Mr. Justice Frankfurter in his opinion, concurring in the decision but not in the opinion of the majority of the court in *Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), . . . U.S. . . . (1946), the controversial doctrine of jurisdiction of fact, treated in *Crowell v. Benson*, 285 U.S. 22 (1932), is suggested. That is, since ministers of religion are exempted from any service, the registrant under trial for violating § 311 may show the fact to be that he is a minister of religion and not merely that the evidence before the board was in substantial support of the board's classification. It will be recalled that it was decided in the latter case and other similar cases² that findings of fact of an administrative agency which go to the jurisdiction of the agency and which affect constitutional rights are not conclusive and may be tried by the courts de novo. Where only statutory rights are involved, as in our cases (ministers of religion have no constitutional rights to exemption from military or other service), the findings of fact are final if substantially supported by evidence be-

²See *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Borax, Ltd., v. Los Angeles*, 296 U.S. 10 (1935); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

fore the agency. See *So. Chicago Co. v. Bassett*, 309 U.S. 251 (1940).³

Finding no error in any one of the three cases treated in this opinion, the judgments are affirmed.

Affirmed.

[Endorsed]: Opinion. Filed Oct. 4, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,928

THEODORE ROMAINE THOMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon appeal from the District Court of the United States for the District of Idaho, Eastern Division.

³See also *Railroad Com'n. v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941); *Local Draft Board No. 1 v. Connors* (CCA 9, 1941), 124 Fed. 2d 388; *Gudmundson v. Cardillo* (CCA D.C., 1942), 126 Fed. 2d 521; *Goff v. United States* (CCA 4, 1943), 135 Fed. 2d 610; *United States v. Messersmith* (CCA 7, 1943), 138 Fed. 2d 599.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Eastern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Oct. 4, 1946.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Thursday, March 20, 1947

Before: Stephens, Healy and Bone, Circuit
Judges.

[Title of Cause.]

ORDER DENYING PETITION
FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant; filed January 6, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

(Clerk's Note: For contents of petition for rehearing, see transcript of record in companion cause, Wesley Wm. Cox. vs. USA, pages 64 to 72.)

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED
UNDER RULE 38 OF THE REVISED
RULES OF THE SUPREME COURT OF
THE UNITED STATES**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ~~sixty-five~~ (65) pages, numbered from and including 1 to and including 65, to be a full, true and correct copy of the entire record, excluding original exhibits, transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of March, 1947.

[Seal]

PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 9, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. The case is consolidated for argument with Cox vs. United States and Roisum vs. United States, Nos. 1256 and 1258.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1453)

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 68

WILBUR ROISUM, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1947.

CERTIORARI GRANTED JUNE 9, 1947.

No. 10942

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors in doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD**

DELLMORE LESSARD,

Corbett Building, Portland, Oregon,
for Appellant.

CARL C. DONAUGH,

United States Attorney, and

J. MASON DILLARD,

Assistant United States Attorney,
United States Court House, Portland, Oregon,
for Appellee.

In the District Court of the United States
for the District of Oregon

16542

UNITED STATES OF AMERICA

v.

WILBUR ROISUM,

Defendant.

INDICTMENT FOR VIOLATION OF SECTION
311, TITLE 50, APP., U.S.C.A., AND SEC-
TION 692.17 PARAGRAPH (c), SELEC-
TIVE SERVICE REGULATIONS

United States of America,
District of Oregon—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations, do find, charge, allege and present:

That Wilbur Roisum, the defendant above named, having been duly classified in Class IV-E under the Selective Training and Service Act of 1940, as amended, and assigned to Civilian Public Service Camp No. 128, Lapine, Oregon, did leave said camp on May 27, 1944, with permission to leave and remain away for a period of one day, and did on to-wit: the 29th day of May, 1944, at Lapine, in the State and District of Oregon, and within the jurisdiction of this Court, knowingly, wilfully, unlaw-

fully and feloniously fail and refuse to return to said camp and did continue and does now continue to remain away from said camp without permission or authority, in violation of the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 21 day of September, 1944.

A True Bill.

/s/ KENNETH H. NELSON

Foreman, United States
Grand Jury

Bail \$1,000.00.

CARL C. DONAUGH

United States Attorney

/s/ JAMES H. HAZLETT

Assistant United States
Attorney

[Endorsed]: Filed Sept. 21, 1944. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

[Title of Cause.]

Now at this day comes the plaintiff by Mr. James H. Hazlett, Assistant United States Attorney, and the defendant, above named, in his own proper person and by Mr. Dellmore Lessard, of counsel.

Whereupon the said defendant is duly arraigned upon the indictment herein, and for plea thereto, says that he is not guilty as charged therein.

Whereupon,

It Is Ordered that the trial of this cause be, and the same is hereby set for Tuesday, October 17, 1944.

[2]

In the District Court of the United States
for the District of Oregon

C-16542

UNITED STATES OF AMERICA,

v.

WILBUR ROISUM,

Defendant.

VERDICT

We, the jury, duly impaneled and sworn to try the above-entitled cause, do find the defendant,

Wilbur Roisum, guilty, as charged in the indictment, herein.

Dated at Portland, Oregon, this 17 day of October, 1944.

/s/ GORDON L. WILTSHIRE
Foreman

[Endorsed]: Filed Oct. 17, 1944. [3]

District Court of the United States

No. 16542

Criminal Indictment in one count for violation of U.S.C., Title 50, Section 311, App., U.S.C.A., and Section 692.17 Paragraph (c), Selective Service Regulations.

UNITED STATES

v.

WILBUR ROISUM

JUDGMENT AND COMMITMENT

On this 3rd day of November, 1944, came Mr. James H. Hazlett, Assistant United States Attorney, and the defendant Wilbur Roisum, appearing in proper person, and by Mr. Dellmore Lessard, of counsel; and

The defendant having been convicted on a verdict of guilty of the offense charged in the indictment in the above-entitled cause, to wit: knowingly, wil-

fully, unlawfully and feloniously failing and refusing to return to Civilian Public Service Camp No. 128, Lapine, Oregon and continuing to remain away from said camp without permission or authority, in violation of the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Two Years.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed CLAUDE MCCOLLOCH

United States District Judge.

[4]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Wilbur Roisum,
Route 2, Box 468, Vancouver, Wash.

Name and address of Appellant's Attorney: Dell-
more Lessard, 505 Corbett Bldg., Portland, Oregon.

Offense: Desertion from Civilian Public Service
Camp.

Date of Judgment: November 3, 1944.

Brief Description of Judgment or Sentence: Two
years in a Federal Penitentiary to be selected by
the Attorney General.

Name of Prison Where now confined if not on
bail: Multnomah County Jail, Portland, Ore.

I, Wilbur Roisum, the above named Appellant,
hereby appeal to the United States Circuit Court
of Appeals for the Ninth Circuit from the judg-
ment above-mentioned on the grounds set forth
below.

1. Denial of motion for a directed verdict of
"Not Guilty" at the conclusion of the presentation
of the Government's case;

2. Denial of motion for a directed verdict of
"Not Guilty" at the conclusion of the trial;

3. Refusal of Trial Court to give requested
instruction to the jury;

4. The giving of the Trial Court's instruction
to the Jury that they cannot consider the irregu-
larities on the part of the Selective Service Board
in their failure and refusal to grant defendant's
request for exemption from training or service, and

in withdrawing from the consideration of the jury all consideration of the claimed discrimination of the draft board against this defendant in refusing to classify him as IV-D and giving him classification IV-E against his will and without his consent;

5. Denial of the Trial Court of defendant's motion for [5] a judgment of "Not Guilty" notwithstanding the verdict of the jury, or in the alternative for a new trial.

Dated: November 3, 1944.

/s/ WILBUR ROISUM
Appellant.

Received a copy of the above Notice of Appeal this 3rd day of November, 1944.

CARL C. DONOUGH,

U. S. District Atty.

By JAMES H. HAZLETT
Assistant.

[Endorsed]: Filed Nov. 3, 1944. [6]

[Title of District Court and Cause:]

ASSIGNMENT OF ERRORS

Comes now the defendant and appellant, Wilbur Roisum, and files the following Assignment of Errors upon which he is relying on appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

That the Court erred in refusing to give defendant's requested instruction to the jury.

II.

That the Court erred in withdrawing from the consideration of the jury the question of whether or not Local Selective Service Board #1, Yakima County, Sunnyside, Washington had erroneously classified defendant in class IV-e instead of IV-d, and thereby denied him his exemption from training and service as a Minister of the Gospel.

III.

That the Court erred in denying defendant's motion for a judgment of acquittal notwithstanding the verdict, and in the alternative for a new trial.

IV.

That the Court erred in finding and adjudging the defendant guilty.

V.

That the Court erred in imposing against the defendant, Wilbur Roisum, any sentence.

DELLMORE LESSARD

Attorney for the defendant.

Received a copy of above this 8th day of December, 1944.

NATHAN M. LANGLEY

Assistant U. S. District

Attorney

[Endorsed]: Filed Dec. 8, 1944. [7]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered That the above entitled case came on regularly for trial on Tuesday, October 17th, 1944 in the above entitled Court at Portland, Oregon, before the, Honorable Claude McColloch, Judge Presiding. A jury having been duly empaneled and sworn as by law provided. The United States of America appeared by Mr. James H. Hazlett, Assistant United States District Attorney. Defendant appeared in person and by his attorney, Mr. Dellmore Lessard.

The appealing defendant respectfully submits the following Bill of Exceptions:

EXCEPTION No. 1

The plaintiff and defendant having concluded and submitted their evidence, the defendant thereupon requested the judge to give the following instruction to the jury:

"The Court hereby instructs you that if you find that Local Board #1, Yakima County, Sunnyside, Wash. erroneously classified defendant in Class IV-E, that their order issued to the defendant to report to the C. P. S. Camp was void and your verdict should be "Not Guilty".

But the Court refused to give such charge, to which refusal the defendant excepted.

EXCEPTION No. 2

The Court thereupon gave the following instructions to the jury:

"The only questions for your consideration, Ladies and Gentlemen, are as in similar cases where you have sat, whether the material [8] allegations of the indictment have been proven beyond a reasonable doubt. Those are that this defendant was classified in Class IV-E under the Draft Law and he was assigned to Civilian Public Service Camp at Lapine, Oregon, and that he left that camp on May 27 with permission to leave one day but that he remained away continuously thereafter, knowingly and willfully, and knowingly and willfully failed and refused to return.

"There has been testimony in support of all of those things. There has been no testimony to the contrary.

"If you find all of those things to be true beyond a reasonable doubt, the Government having the burden of proof in this as in all criminal cases—and a reasonable doubt means such doubt as would cause an average reasonable person to hesitate in making an important decision in his own affairs—if you find those things to be true beyond a reasonable doubt, it is your duty to return a verdict of guilty. If you are not satisfied with the proof of all of those things beyond a reasonable doubt, it is equally your duty to return a verdict of not guilty.

"This case presents, like other cases that you have sat on, the difference of opinion between the registrant and his Draft Board as to his classification, but I instruct you, as I have in other cases, Ladies and Gentlemen, that under the circumstances

of this case the action of the Draft Board in classifying him IV-E is conclusive for the purposes of this case, and while certain other matters have been allowed to be gone into, they really have no bearing on the question involved, which is the truth or falsity of the material allegations of the indictment as I have stated them to you.

"You will take the exhibits with you to the jury room and give them the weight you believe they are entitled to, along with the evidence you have heard in the case.

"Your verdict must be unanimous. It will be signed by your foreman whom you will elect upon your retirement, and returned into court."

To the giving of said charge the defendant excepted specifically to that portion of the charge in which the court withdrew from the consideration of the jury the consideration of whether or not the Local Selective [9] Board had erroneously classified him in Class IV-E instead of IV-D and thereby denied him his lawful exemption as a minister of the Gospel.

EXCEPTION No. 3

The said cause having been submitted to the jury by the Court under its charges, and the jury having rendered a verdict against the defendant, on October 17th, 1944, at the term of Court aforesaid, the defendant made and submitted to the said Court his motion for a judgment notwithstanding the verdict of the jury, and in the alternative for a new trial, on the ground of error committed by the trial judge

at the time of trial in that the trial judge refused to give the charge submitted by the defendant, and in that the trial judge in his charge to the jury withdrew from their consideration the question of whether or not the local selective service board which had jurisdiction of the defendant had been guilty of arbitrary, capricious and unlawful conduct in giving the defendant a classification of IV-E and continuing him in said classification after he had informed them that he did not claim to be a conscientious objector, and in refusing him a classification of IV-D and thereby exempt him from all training and service under the Selective Service and Training Act.

On November 3rd, 1944 the said motion came on to be heard, and upon consideration of said motion the court on the same day denied the same, to which ruling the defendant excepted.

In connection herewith there is hereto attached a full transcript of the testimony introduced in this cause, and the arguments of counsel, together with all exhibits certified by Alva W. Person, Reporter, and made a part of this Bill of Exceptions.

DELLMORE LESSARD

Attorney for defendant and
appellant.

United States of America,
State of Oregon,
County of Multnomah—ss.

It Is Hereby Certified that on the . . . day of
November, 1944, the Honorable Claude McColloch,

Judge of the above entitled Court, for good cause shown entered an Order allowing defendant, Wilbur Roisum, to have to and including the 20th day of December, 1944, for settlement and filing of Bill of [10] Exceptions and Assignment of Errors, in respect to the within appeal.

It further appearing that there is attached hereto a full transcript of the testimony together with all exhibits offered in the above entitled case and made a part of this Bill of Exceptions.

It Is Further Certified That the foregoing Exceptions asked and taken by the defendant, Wilbur Roisum, were duly presented within the time fixed by law and the Order of this Court, and the Bill of Exceptions is by me allowed and signed this 8th day of December, 1944.

CLAUDE McCOLLOUGH

Judge of the District Court of the United States
for the District of Oregon.

State of Oregon,

County of Multnomah—ss.

Due service of the within Bill of Exceptions is hereby accepted in Multnomah County, Oregon this 8th day of December, 1944, by receiving a copy thereof, duly certified to as such by Dellmore Lessard, attorney for defendant and appellant.

NATHAN M. LANGLEY

Asst. U. S. District Atty.

[Endorsed]; Filed Dec. 8, 1944. [11]

[Title of District Court and Cause.]

On motion of counsel for the defendant in the above entitled cause, and for good cause shown,

It Is Ordered That the time for settling and filing the Assignment of Errors and Bill of Exceptions, and also the filing of the transcript on appeal of this cause, be and the same is hereby extended to and including Dec. 20, 1944.

Dated this 28 day of November, 1944.

CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed Nov. 28, 1944. [12]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter coming on regularly for hearing upon motion of Dellmore Lessard, attorney for the defendant, and good cause appearing;

It Is Ordered that the time for the filing of the transcript of the record herein with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including the 29th day of December, 1944.

Dated at Portland, Oregon this 19 day of December, 1944.

[Sgd] CLAUDE McCOLLOCH

Judge.

[Endorsed]: Filed Dec. 19, 1944, [13]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant hereby adopts as his points on appeal the assignments of error heretofore placed on file herein.

Dated at Portland, Oregon this 18th day of December, 1944.

/s/ **DELLMORE LESSARD**

Attorney for defendant and
appellant

Received a copy of above this 19th day of December, 1944.

/s/ **J. MASON DILLARD**

Asst. U. S. District Attorney

[Endorsed]: Filed Dec. 19, 1944. [14]

[Title of District Court and Cause.]

**ORDER TRANSMITTING ORIGINAL
EXHIBITS**

This matter coming on regularly for hearing upon motion of Dellmore Lessard, attorney for the defendant, and good cause appearing;

It Is Ordered that the Clerk of this Court be, and he is hereby directed to transmit all of the exhibits in this suit in their original form to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, at Portland, Oregon this 26th day of December, 1944.

CLAUDE McCOLLOCH

Judge,

[Endorsed]: Filed Dec. 26, 1944. [15]

[Title of District Court and Cause.]

PRAECIPE TO CLERK

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to-wit:

1. Indictment
2. Record of plea of not guilty
3. All exhibits
4. Verdict of Jury
5. Judgment of Court and sentence
7. Notice of appeal
8. Assignment of Errors
9. Bill of Exceptions
10. All orders extending time
11. Statement of points upon which appellant intends to rely
12. This praecipe
13. Order to forward original exhibits
14. Transcript of proceedings.

Dated at Portland, Oregon this 18th day of December, 1944.

/s/ **DELLMORE LESSARD**

Attorney for defendant and
appellant

Received a copy of above this 19th day of December, 1944.

J. MASON DILLARD

Asst. U. S. District Atty.

A true copy

DELLMORE LESSARD

Attorney for defendant and
appellant

[Endorsed]: Filed Dec. 19, 1944. [16]

CERTIFICATE OF CLERK

United States of America
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 17 inclusive, contain a transcript of the matters of record in said court pertinent to the appeal and as designated in the praecipe for transcript filed by the appellant in a criminal case in said court numbered C 16542, in which the United States of America is plaintiff and appellee, and Wilbur Roisum is the defendant and appellant; that I have compared the foregoing transcript with

the original thereof and that the same is a full, true and correct transcript of the said record and proceedings had in said court in said cause in accordance with the rules and praecipe for transcript filed in said cause by the said appellant.

I have annexed to and am transmitting with the said transcript the original assignment of errors and the original bill of exceptions filed in said cause by the said appellant.

I am enclosing with this record, the original exhibits introduced at the time of trial numbered 1 to 5 inclusive, also transcript of trial proceedings.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 27th day of December, 1944.

[Seal]

LOWELL MUNDORFF,

Clerk.

By F. L. BUCK

Chief Deputy. [17]

[Title of District Court and Cause.]

PROCEEDINGS

Portland, Oregon, Tuesday, October 17, 1944.

2:07 o'clock P. M.

Before: Honorable Claude McColloch, Judge, and
a jury.

Appearances:

Mr. James H. Hazlett, Assistant United States Attorney, in behalf of the United States of America.

Mr. Dellmore Lessard, Attorney for the Defendant.

Mr. Wilbur Roisum, the defendant, was present.

The Court: United States against Roisum. Call the jury.

(A jury was here impaneled and sworn.)

The Court: Mr. Hazlett.

Mr. Hazlett: If it please the Court, Ladies and Gentlemen of the jury: The issue in this case is a very narrow issue. The defendant registered at Yakima, Board No. 1, which is [1*] located at Sunnyside, Washington. He was classified by the Board as a conscientious objector in the classification of IV-E, and he was assigned to Camp 128, which is located at Lapine, Oregon. He went to the camp

*Page numbering appearing at top of page of original Reporter's Transcript.

and after remaining there some time he went away on a furlough and did not return.

Mr. Lessard: May it please the Court, Ladies and Gentlemen: You have listened to one other case today and perhaps you are wondering why we are having these trials. The reason that we are having these trials is that these defendants, who are Jehovah's Witnesses, are accused of failing to obey an order of the Draft Board. They come into court and they feel they are entitled to tell their story. They want you to know just what their belief is and the things they stand for, and that they are here, not as draft evaders but as believers in a certain belief, which to them is precious enough for them to come into court and tell you about it. So in this instance the defendant was classified by the records of the Sunnyside Board in classification IV-E and ordered to report to a conscientious objector's camp. The defendant did report to the camp and the evidence will show you that he did not remain at the camp because he claimed that the Draft Board erroneously classified him in IV-E instead of IV-D, and that he did not feel that the Draft Board had a right, or the camp had a right, either one, to compel him to remain, and so he left.

Mr. Hazlett: Miss Christopherson. [2]

The Clerk: Will you state your name, please.

Mrs. Christopherson: Mrs. Avis Christopherson.

MRS. AVIS CHRISTOPHERSON

was thereupon produced as a witness in behalf of the United States of America and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hazlett:

Q. You are the Chief Clerk of Local Board No. 1 in Yakima County, Washington?

A. Yes, sir.

Q. Have you the file with you of the defendant in this case, Wilbur Roisum? A. Yes, sir.

Q. Will you turn to that file and produce the questionnaire which was sent to your Board.

(Witness produces document.)

Mr. Hazlett: We ask that to be marked Government's Exhibit 1 for identification and will ask to have it introduced in evidence.

(The document was thereupon marked Government's Exhibit 1 for identification, was passed to Mr. Lessard for examination.)

Mr. Lessard: No objection.

The Court: Admitted. [3]

(The Selective Service Questionnaire of Wilbur Roisum, so offered and received, having been previously marked for identification, was marked received as Government's Exhibit 1.)

Mr. Hazlett: Q. Respecting Government's Exhibit No. 1, will you state the date of the birth of the defendant as stated by him in his questionnaire.

A. September 18th, 1919.

(Testimony of Mrs. Avis Christopherson.)

Q. What classification was given the defendant by the Board?

A. Mr. Roisum was classified in Class I ~~VO~~ by the Board on June 25th, 1942.

Q. Now did he appeal from that classification?

A. Yes, sir.

Q. And was an appeal taken?

A. Yes, sir. He appealed on June 30th, 1942.

Q. And what classification did the Appeal Board give him?

A. The Board of Appeals placed Mr. Roisum in Class IV-E on August 4th, 1943.

Q. Have you the vote of the Appeal Board there?

A. Yes, sir; on the back of the questionnaire.

Q. What was the vote of the Appeal Board?

A. The vote of the Appeal Board was four to none.

Q. What was it?

A. It was a unanimous vote, four to nothing. [4]

Q. Placing him in IV-E? A. Yes, sir.

Q. Now subsequent to the classification by the Appeal Board of the defendant in IV-E, did your Board receive an assignment from the Director of Selective Service for this defendant?

A. Yes, sir, we did.

Q. Will you produce that.

(The witness here produced document.)

Mr. Hazlett: And we will have that marked as Government's Exhibit No. 2 for identification, which we will introduce in evidence.

(Testimony of Mrs. Avis Christopherson.)

(The document so offered was marked Government's Exhibit 2 for identification.)

Mr. Lessard: Nothing.

The Court: Admitted.

(The Assignment to Work of National Importance dated January 15, 1944, signed Lewis B. Hershey, Director, concerning Registrant Wilbur Roisum, so offered and received, having been previously marked for identification, was marked received as Government's Exhibit 2.)

Mr. Hazlett: Q. To what camp was the defendant assigned by the Director of Selective Service?

A. He was assigned to Civilian Public Service Camp No. 128 at [5] Lapine, Oregon.

Q. Now pursuant to that assignment by the Director of Selective Service, did your Board send him an order to report for entrainment?

A. I beg your pardon?

Q. Pursuant to the receipt of that assignment did your Board order the defendant to report for entrainment to Camp No. 128 at Lapine, Oregon?

A. Yes, sir, we did.

Q. And when was that?

A. We mailed the order to Mr. Roisum on January 28th, 1944, ordering him to report at the Planters Hotel at Sunnyside, Washington, on the 7th of February, to proceed—

Q. Now pursuant to that request did he report?

A. No, sir, he didn't.

(Testimony of Mrs. Avis Christopherson.)

Q. Now subsequent to that did you send him another order to report?

A. Yes, sir. We mailed him a second order to report, or, rather, we delivered it to him; I delivered it in person on April 27th, 1944.

Q. Was he to report then?

A. Yes. He was to report on April 28th, on the morning of April 28th, 1944.

Q. Now did he report then?

A. Yes, sir, he reported. That is, he left Sunnyside. [6]

Q. He left Sunnyside?

A. But he didn't reach the camp.

Q. He didn't get to the camp? A. No.

Q. Subsequent to that did you send him another order to report?

A. Yes, sir. On May 18, 1944, we mailed him a third order, instructing him to report on the 23rd of May, 1944.

Q. Now will you just tell of the circumstance of sending that last request. A. Yes, sir.

Q. What was that pursuant to?

A. After the first order to report was mailed and he failed to report, we reported him to the Federal Bureau of Investigation and he was tried at Yakima, Washington, and the trial was stopped and the Judge gave him another chance to go to camp and he accepted it.

Q. That was Judge Schwellenbach?

A. Yes, sir.

(Testimony of Mrs. Avis Christopherson.)

Mr. Hazlett: We will ask that all of those orders be introduced as one exhibit and marked Government's Exhibit No. 3 for identification and ask to have them introduced.

(The three orders to report for work of national importance so offered were marked Government's Exhibit 3 for identification, and passed to Mr. Lessard.) [7]

Mr. Hazlett: We introduce those.

The Court: Admitted.

(The three orders to report for work of national importance dated January 28, 1944, April 27, 1944, and May 18, 1944, directed to Wilbur Roisum, so received in evidence, having been previously marked for identification, were further marked received as Government's Exhibit 3.)

Mr. Hazlett: Q. After you had sent him this last order to report for entrainment to camp, did he report for entrainment to your Board?

A. Yes, sir; in compliance with the order mailed on May 18th.

Q. And you furnished him transportation and everything? A. Yes, sir.

Mr. Hazlett: You may inquire.

The Court: I wonder if you have got the exhibits in that you want. The Clerk thought there might be a little mix-up here.

(Testimony of Mrs. Avis Christopherson.)

Mr. Hazlett: I want the three orders from the Board.

(The Clerk here passed paper to Mr. Hazlett.)

Mr. Hazlett: Yes, that is one of them.

The Court: Let Mr. Lessard see it.

Mr. Lessard: I have seen that order but, if the Court please, may we have the whole file as an exhibit, and may I examine the file before we proceed?

[8]

The Court: Mark the file.

(The file of Local Board 1, Yakima County, Sunnyside, Washington, in re Wilbur Roisum, was thereupon marked Court's Exhibit 4.)

(Proceedings in this trial were suspended at 2:33 o'clock p.m. until 2:38 o'clock p.m., when the following further occurred herein:)

The Court: Now you may proceed. Proceed with this trial.

Mr. Hazlett: I would like to ask one question I fear I forgot to ask.

The Court: Yes.

Mr. Hazlett: Q. Referring to Government's Exhibit No. 1, will you look at that and state the date of the birth of the defendant. I may have asked it but I want to ask it to be sure.

The Court: Yes, you did. The date of birth was September 18, 1919.

Mr. Hazlett: I withdraw the question. You may inquire, Mr. Lessard.

(Testimony of Mrs. Avis Christopherson.)

Cross Examination

By Mr. Lessard:

Q. Mrs. Christopherson, referring to Government's Exhibit No. 1, which is the defendant's questionnaire—

The Court: Her name is Christopherson, isn't it?

The Witness: Yes.

Mr. Lessard: Christopherson. I beg your pardon.

Q. In that questionnaire did the defendant claim to be a con- [9] scientious objector?

A. The defendant checked question of Series X 1—

The Court: Will you speak up?

The Witness: Yes, sir. He checked Series X 1, which states, "By reason of religious training and belief I am conscientiously opposed to participation in war in any form and therefore claim exemption from combatant training and service."

Q. He also claimed to be a minister of the gospel, did he not? A. Yes, sir.

Q. Later on did the registrant fill out a conscientious objector form? A. Yes, he did.

Q. May we have that?

The Witness: May I have the file, please?

(Court's Exhibit 4 was here passed to the witness.)

Q. For the time being just lay it down. Now later on you received a letter from the defendant

(Testimony of Mrs. Avis Christopherson.)

dated February 3rd, 1944, in which he told the Board that he did not claim—did not wish to be classed as a conscientious objector, did you not?

A. That letter was addressed to the State Director of Selective Service and we received a copy of it on February 7th.

Q. And in that letter defendant waived all claims as a conscientious objector?

A. At that time the defendant—we received this letter on the [10] day that the defendant was supposed to report for camp assignment.

Q. You received another letter dated October 10th, 1944, did you not, which was prior to the time he was supposed to report?

A. October 10th, 1944?

Q. Yes.

A. We just received that the other day.

Q. Oh, yes. I was thinking of 1943. May I have the letter of February 3rd?

(The witness passed paper to Mr. Lessard.)

Mr. Lessard: May it please the Court, I desire to have this letter read to the jury, and I presume the Court wants me to read it instead of having the witness read it.

Mr. Hazlett: If I understand—I may be mistaken—this letter was received after the order had been sent to the defendant to report, and having been received since or subsequent to his order to report for entrainment it would have nothing whatever to do with this case.

The Court: I will so instruct the jury but he may read it, since the file is in the case anyhow.

(Testimony of Mrs. Avis Christopherson.)

Mr. Lessard: "Local Board No. 1, Yakima County, Sunnyside, Washington.

"My name, Wilbur Roisum, Outlook, Washington, Order No. 4590. Local Board No. 1, Yakima County, Sunnyside, Washington. I registered October 16th, 1940. My questionnaire was [11] filed in fall of 1941. First Class was I-A-O from local board in June 26, 1942. Class of appeal board was I-A-O. I received that October 1, 1942. On October 5th, 1942, I received a notice of induction into the Army. Two days later I received a I-A class. I notified them of my intention on their induction notice. Then the local board appealed my case. Then I went before a government hearing officer in Spokane May, 1943. The first part of December, 1943, I received a 4-E classification. I tried to appeal that classification but my local board said I could not do so, then I received a notice to report to a C.O. camp in Lapine, Oregon, the 7th of February, 1943.

"Dear Sir:

"This letter is a notice of my request for a appeal to the President for a 4-D classification. A few days ago I received a 4-E classification from a appeal board in Spokane. This classification is clearly out of my proper class, and therefore I am unable to accept it. I would be forced to accept the penalty it would bring about if I were forced to keep that classification.

"Ever since the beginning of my registering

(Testimony of Mrs. Avis Christopherson.)

under the laws of the Selective Service, I have asked for a 4-D classification. I had served as a minister of the gospel for many months before the enactment of the Selective Service Law and have been a student of the divine word for over ten years. I have been a pioneer under the Watchtower Bible and Tract Society for two [12] different periods since 1940. Also served with the Sunnyside, Kennewick, and Prosser County of Jehovah's witnesses in the state of Washington, and with the Dalles County in Oregon.

"I was a pioneer till recently when I had to resign to go under a operation, and diet, treatment for a stomach ailment that I have had for over 20 years.

"I believe that under the laws of this country I have a right to a 4-D classification, and my activity which are disclosed in my file at my local board if given a fair consideration should establish that fact.

"Sincerely yours,

WILBUR ROISUM.

"P. S. I request that my case be reviewed and that this last induction notice be postponed. Also that you carry this to the President.

"When I received my questionnaire I filled it out promptly, and filed with it affidavits, papers, etc., to establish my rightfulness to a 4-D classification. Then the local board sent me a I-AO classification.

"I appeared before the local board personally to ask them for my proper classification after receiving a I-AO classification, and if I could not get it

(Testimony of Mrs. Avis Christopherson.)

I wanted to appeal. The chairman went into a fit of rage against Jehovah's witnesses, and I tried to explain my qualification as a minister of the gospel, in a friendly way, and he became more angry and left the office, then another member of board handed me the proper [13] paper to sign for my appeal.

"Some months later I heard from the appeal board they left me in I-AO. The report says the F.B.I. investigated my case. However, I know of some they asked information of me, that did not even know I existed.

"Then I received a notice of induction into the Army, following two days later by a I-A classification. I notified them again of my position and then they appealed my case. Some months later I got a notice I could go before a government hearing office in Spokane. I went. He told me he could make no statement in my behalf before the appeal board concerning my right for a 4-D classification, but only on a 4-E classification. That being the case the appeal would be worthless as far as I was concerned. And I should the right of another appeal just on that. He couldn't even say anything about my right of a 4-D classification to the appeal board.

"When I received my notice of a 4-E classification I went up to the local board and asked them for another appeal, but they said I could not get another appeal. But after that—but after received more information on it the law shows I have a right of another appeal. That is the reason I am late with

(Testimony of Mrs. Avis Christopherson.)

this appeal. A 4-E does not fit me any more than a I-A classification."

Q. Do your records show as to whether or not this defendant was permitted to appeal from the conscientious objector classifica- [14] tion of IV-E?

A. The regulations state that if the decision of the Appeal Board is by unanimous vote, that he cannot appeal to the President, unless the State Director deems it in the interest of justice.

Q. Which classification did the Local Board place him in before he was placed in IV-E?

A. The Local Board placed him in I-AO and he did appeal that.

Q. And the Appeal Board placed him in IV-E?

A. Yes, sir.

Q. But he didn't ask for the IV-E?

A. Well, he was classified according to the information in his cover sheet.

Mr. Jessard: That is all.

Redirect Examination

By Mr. Hazlett:

Q. Just one question. You have stated the vote was unanimous of the Appeal Board?

A. Yes, sir.

Mr. Hazlett: That is all.

(Witness excused.)

Mr. Hazlett: Mr. Murch.

The Clerk: Will you state your name, please.

Mr. Murch: Herbert L. Murch. [15]

HERBERT L. MURCH

was thereupon produced as a witness in behalf of the United States of America and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hazlett:

Q. Are you Camp Director of Camp No. 128 at Lapine, Oregon? A. Yes.

Q. And were you the Camp Director when Wilbur Roisum came to the camp? A. Yes, sir.

Q. Will you state when he came to the camp.

A. I have the date here on the receiving form. He reported at camp on the 23rd day of May, 1944.

Q. Is that a copy of the notice to report?

A. Yes, sir.

Mr. Hazlett: We offer that in evidence, if the Court please—ask that it be marked and offer it in evidence.

(The document so offered was marked Government's Exhibit 5 for identification and passed to Mr. Lessard.)

The Court: Admitted.

(The Order to Report for Work of National Importance dated April 27, 1944, so offered and received, having been previously marked for identification, was marked re- [16] ceived as Government's Exhibit 5.)

Mr. Hazlett: When did he report to the camp? What was the date? A. May 23, 1944.

Q. How long did he remain at the camp?

(Testimony of Herbert L. Murch.)

A. Well, his work record shows that he arrived on May 23rd and was on the project the 24th, 25th, 26th and 27th. On Sunday, May 28, or Saturday, May 27th, he asked for a week-end leave, which was granted. He went to Bend and never returned. He was at camp, arriving on the 23rd. Counting the day he arrived, on the 23rd, he was there five days.

The Court: What does week-end leave mean?

A. They are granted, upon request to leave camp Saturday evening after five p.m., after the end of the work day, and be at liberty until midnight Sunday night, but he didn't return to the camp.

Mr. Hazlett: Q. And he has never returned to camp?

A. No, he has not.

Mr. Hazlett: You may inquire.

Mr. Lessard: No questions.

(Witness excused.)

Mr. Hazlett: The Government rests.

DEFENDANT'S EVIDENCE

Mr. Lessard: Call defendant, Mr. Roisum: [17]

The Clerk: Will you state your name, please.

Mr. Roisum: Wilbur Roisum.

WILBUR ROISUM,

the defendant, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lessard:

Q. Where do you reside, Mr. Roisum?

A. Vancouver, Washington.

Q. How long have you resided there?

A. Since last July.

Q. And who do you reside with over there?

A. With my parents.

Q. And you are married, aren't you?

A. Yes, I am.

Q. Your wife live with you, too?

A. Yes, she does.

Q. Now where did you reside before you lived at Vancouver?

A. I lived at Camas a short time, about a month and a half, I believe. Before that I resided in Yakima Valley.

Q. And is that where you registered for the Selective Service, in Yakima?

A. Sunnyside, Washington, in Yakima Valley.

Q. Now at the time you received—referring to

(Testimony of Wilbur Roisum.)

the questionnaire which has been introduced, did you state your occupation? [18]

A. Yes, I did.

Q. And what occupation did you state?

A. Minister of the gospel.

Q. Did you state any other occupation?

A. Not in particular, no.

Q. As to the conscientious objector, did you state whether or not you were a conscientious objector?

A. I always asked for IV-D and tried to bring it out to the Board that I was not taking a position of a conscientious objector.

Mr. Lessard: Can the last juror hear him? You will talk louder, Mr. Roisum.

Mr. Hazlett: That answer was not responsive to counsel's question.

Mr. Lessard: Well, the jury didn't hear it anyhow, so we will ask it over.

Q. Did you ask for a conscientious objector classification, or not? A. No, I never.

Q. What classification did you request the Board to give you? A. Classification IV-D.

Q. And why did you ask for that classification?

A. Because I had worked as a minister ever since the spring of 1939 and had studied years previous to that.

Q. How old are you?

A. I am twenty-five years old. [19]

Q. Now, how long? You say you have studied years previously to that; how many years?

A. Ever since 1930.

(Testimony of Wilbur Roisum.)

Q. And in what religious sect or organization did you study?

A. I am one of Jehovah's Witnesses and we receive our instructions in this Gospel of the Kingdom from the Watchtower Bible and Tract Society in Brooklyn, New York.

Q. The Board then gave you classification I-AO?

A. Yes. That was the first classification I received from the Board.

Q. Then what happened? What did you do?

A. I appealed that classification. I went before the Board personally and asked to appeal for a IV-D classification.

Q. And were you informed of what the Appeal Board determined on that appeal?

A. I was, but before that I received a notice to report for induction into the armed forces and right after that—

Q. That is while your appeal was pending?

A. Uh huh; and then right after that I received a I-A classification from the Local Board.

Q. Was that I-A classification subsequently changed?

A. Well, later—well, they sent me a delinquent notice of induction into the Army and sometime after that I received a I-AO classification again from the Appeal Board, confirmed by the Appeal Board. [20]

Q. Then what did you do?

A. Then I, as a matter of fact, told them that I could not accept it, I believe, but I never took

(Testimony of Wilbur Roisum.)

no action upon it because I didn't know of my rights of appeal.

Q. Well, did you take any action? A. No.

Q. What happened after that?

A. Well, as far as I can understand, the Board must have took some sort of action on account of my refusal to report.

Q. Were you sent any other classification after that?

A. Then I received the IV-E classification.

Q. Then what did you do?

A. Well, I went before the Board and requested—well, they asked me to come, so I went before them and I asked—they wanted information on my rights of appeal. They said I went as far as I could. But I received a pamphlet from Washington, D.C., on laws respecting that, and it seemed to indicate in that pamphlet that I had a right of appeal, so I took advantage of it. That appeal was read to the jury today.

Q. What is your classification at the present time? A. IV-E.

Q. And do you have your classification card with you which shows whether it was issued by the Local Board or the Appeal Board?

A. I can look at it. It says Board of Appeals by vote of five to nothing, IV-E. [21]

Q. Had you ever asked for that classification?

A. No, I hadn't. I have requested many times that I be not given that classification.

(Testimony of Wilbur Roisum.)

Q. Well, subsequently you were ordered to report to the camp at Lapine, Oregon?

A. Well, after my IV-E classification, the one I just showed, I refused to go and I was arrested by the United States Marshal at Yakima—Sunnyside, Washington—I don't remember; it was last spring. I don't know the exact date.

Q. And you were arrested by the Marshal?

A. Uh huh.

Q. Were you placed in custody?

A. Yes, I was.

Q. And then what happened?

A. I was released on bond until my trial.

Q. And what happened at the trial?

A. Well, I handled my own case and Judge Schwollenbach said in view of the fact of the irregularities in my classifications and the conduct of the Local Board he offered me an opportunity to appear down at the—report down at the C.O. Camp at Lapine and raise the issue there through a habeas corpus. He says as far as he was concerned he could listen to what I had to say but he had no authority to act on it, his hands were tied.

Q. Then you did report subsequently down to Lapine? A. Yes, I did. [22]

Q. And did you, or did you not, stay?

A. At the first I had two notices to report. The first one they only gave me transportation to Bend, Oregon. I never knew where Lapine was and I inquired and they said it was fifty miles out

(Testimony of Wilbur Roisum.)

in the woods. I didn't wish to walk, so I went back home.

Q. Then what happened?

A. They just sent me another notice to report.

Q. Those were, as far as you know, the two notices Miss Christopherson told about this morning?

A. Yes.

Q. Did you report the second time?

A. Yes, I did.

Q. What did you do after you reported?

A. I was there about three days, I believe, and as the understanding was I was only there for a habeas corpus and my understanding was quite far from the true facts of securing a habeas corpus and I knew it would not work in my case because it was voluntary confinement on my part, which I can't do, for my business is to preach this Gospel of the Kingdom and not to accept voluntary servitude.

Q. Is staying there in conflict, then, with your religious views?

A. Most certainly, for I only went there for a habeas corpus.

Q. Will you tell the jury how it conflicted with your views?

A. Well, as I said, my occupation is preaching this Gospel of the Kingdom, not knocking limbs off of trees out in the middle [23] of the mountains. Christ Almighty gave me this opportunity to publish this Gospel of the Kingdom and I would not throw it away like that.

(Testimony of Wilbur Roisum.)

Q. Do you think of anything else the jury ought to know about this matter pending against you?

A. Well, I was waiting for the information of a habeas corpus, and for one thing the expense was far above what I could afford; I found that out; and, therefore, I left the camp. However, at the camp I never took no oath that I was to remain there. None was asked of me. I gave no indication I was staying there except for my habeas corpus, and when that did not come through I had no more reason to be there, for I was only there for three days.

Mr. Lessard: Cross examine.

Cross Examination

By Mr. Hazlett:

Q. Now Judge Schwellenbach informed you at that trial that the question of classification was no defense to an indictment, did he not?

A. What is the question again?

Q. Did not Judge Schwellenbach inform you there at that trial that your claim of being improperly classified was no defense to an indictment?

A. No defense to the indictment?

Q. Yes. [24] A. I could not say.

Q. Did not he inform you that the only way you could raise the question of the classification was to submit to your Board and then sue out a writ of habeas corpus?

A. He said the only way I could do it was through reporting to this C.P.S. camp.

Q. And wasn't that case dismissed?

(Testimony of Wilbur Roisum.)

A. Yes.

Q. On your promise that you would report to the camp and sue out a writ of habeas corpus?

A. On condition that I report to the camp and, if I wished, secure my habeas corpus.

Q. Why did you not sue out a writ of habeas corpus, as Judge Schwellenbach advised you?

A. As I stated here, the expense was far above my means.

Q. You knew, then, when you deserted, that you had no defense, such as Judge Schwellenbach had mentioned to you?

A. Will you ask that again, please?

Q. When you deserted, then, you knew you could not raise the defense which he suggested you could raise by a writ of habeas corpus, did you not?

A. If they are able to raise it outside the camp or not I don't know.

Mr. Hazlett: That is all.

Mr. Lessard: That is all.

(Witness excused.) [25]

Mr. Lessard: Defendant rests.

Mr. Hazlett: No rebuttal.

The Court: Argue.

Mr. Hazlett: No argument.

Mr. Lessard: If it please the Court, I haven't any argument but I am preparing an instruction which I would like to submit to the Court. I haven't finished it yet.

(After a short pause Mr. Lessard passed paper to Mr. Hazlett.)

Mr. Hazlett: I object to the giving of that, because the Draft Board is the sole judge of classification.

(The paper referred to was here passed to the Court.)

Mr. Lessard: I have made the record also show, if the Court please, that this defendant raises the same objection that was raised by the previous defendant, that the Draft Board classified him wrongly, without his requesting the classification.

The Court: The only questions for your consideration, Ladies and Gentlemen, are, as in similar cases where you have sat, whether the material allegations of the indictment have been proven beyond a reasonable doubt. Those are that this defendant was classified in Class IV-E under the Draft Law and he was assigned to Civilian Public Service Camp at Lapine, Oregon, and that he left that camp on May 27 with permission to leave for one day but that he remained away continuously thereafter, [26] knowingly and willfully, and knowingly and willfully failed and refused to return.

There has been testimony in support of all of those things. There has been no testimony to the contrary.

If you find all of those things to be true beyond a reasonable doubt, the Government having the burden of proof in this as in all criminal cases—and a reasonable doubt means such doubt as would cause an average reasonable person to hesitate in making an important decision in his own affairs—if you find those things to be true beyond a reason-

able doubt, it is your duty to return a verdict of guilty. If you are not satisfied with the proof of all of those things beyond a reasonable doubt, it is equally your duty to return a verdict of not guilty.

This case presents, like other cases that you have sat on, the difference of opinion between the registrant and his Draft Board as to his classification, but I instruct you, as I have in other cases, Ladies and Gentlemen, that under the circumstances of this case the action of the Draft Board in classifying him IV-E is conclusive for the purposes of this case, and while certain other matters have been allowed to be gone into, they really have no bearing on the question involved, which is the truth or the falsity of the material allegations of the indictment as I have stated them to you.

You will take the exhibits with you to the jury room and give them the weight you believe they are entitled to, along [27] with the evidence you have heard in the case.

Your verdict must be unanimous. It will be signed by your foreman whom you will elect upon retirement, and returned into court.

Now do you want to state some exceptions, Mr. Lessard?

Mr. Lessard: Of course the defendant desires to except to the Court's refusal to give the requested instruction. Also to the Court's instruction that the jury is not to consider the matter of the Draft Board's erroneous classification of the defendant.

We feel we are entitled, under the *Billings v. Truesdell* decision, to have that go to the jury.

I might call the Court's attention to—does the Court care to have me read this paragraph?

The Court: All right.

Mr. Lessard: I would like to read this to the Court. This is a recent case that has come out since the *Falbo* case. Reading from page 558:

“Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies.” In this instance Roisum did report at the camp. “Unless he follows that procedure he may not challenge the legality of his classification in the courts”, inferring if he follows that procedure he may challenge the legality of the classification. “But we can hardly say that he must report to the military in [28] order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the Board's order to report.”

So the defendant contends because he did follow the administrative process the jury has a right to consider whether or not the board erred in his classification and discriminated against him, by authority of the case of *Billings v. Truesdell*, decided by the Supreme Court March 27, 1944.

Mr. Hazlett: That does not hold any such thing, if the Court please. In that case he reported there. He wasn't inducted. They said he should be inducted. Now in this case he did report to the camp; he deserted. He should have exercised the right. That is the holding in that case and every other case. He must exercise the right after he gets there—not desert.

Mr. Lessard: I might tell the Court that inasmuch as the defendant was never inducted he, therefore, could not be guilty of desertion, if we are going to accept Mr. Hazlett's reasoning.

Mr. Hazlett: He went to the camp.

Mr. Lessard: But the Supreme Court does not say habeas corpus is the exclusive remedy. It says unless he does follow the procedure he may not challenge the classification. It does not [29] say how he may challenge it, so we are contending that——

Mr. Hazlett: He has not followed the procedure because he went there and deserted.

The Court: Well, that is all, Gentlemen. Well, the case will be submitted as I have instructed. Swear the bailiffs.

(Two officers were here sworn to take charge of the jury.)

The Court: Take the indictment with you to the jury room, as in other cases. It is not to be considered by you as evidence—merely a statement of the Government's charges against the defendant. I will receive your verdict at any time.

(At this point the jury retired in charge of the officers at 3:14 o'clock P.M. and at 3:48 o'clock P.M. the jury returned into court and the following occurred:)

The Court: Have you arrived at a verdict?

Foreman Wiltshire: Yes, your Honor.

(The verdict was passed to the Court.)

The Court: Mr. Wiltshire has signed the verdict for the jury as foreman. Clerk, read it.

(The Clerk read the verdict as follows:)

"In the District Court of the United States for the District of Oregon.

C-16542.

"UNITED STATES OF AMERICA,

v. [30]

WILBUR ROISUM,

Defendant.

VERDICT

"We, the jury, duly empaneled and sworn to try the above-entitled cause, do find the defendant, Wilbur Roisum, guilty as charged in the indictment herein.

"Dated at Portland, Oregon, this 17th day of October, 1944."

Signed, "GORDON L. WILTSHIRE,
Foreman."

The Court: Is this your verdict?

Jurors: Yes.

-The Court: Thank you for your consideration of the case and you are now discharged. Please return tomorrow morning at ten o'clock. The audience will remain seated while the jury leaves the courtroom. Just a minute before you leave the box. You perhaps want to make a motion similar to the one you made in the other case?

Mr. Lessard: Yes, your Honor. Due to the fact that it appears in this case the defendant was classified in Classification IV-E without his request, against his will, by the Local Draft Board, the defendant moves the Court for a judgment notwithstanding the verdict and, in the alternative, for a new trial, on the same grounds that were put in the other case.

The Court: Well, I will take that under consideration and will hear argument on it the same time as in the other case.

You are now discharged from further consideration of [31] this case.

(The jury here retired from the courtroom at 4:52 o'clock P.M.)

The Court: Unless you have serious objection, this defendant's bail will be continued until I pass sentence.

Mr. Hazlett: No objection.

The Court: Tomorrow morning at ten o'clock then.

(Court was thereupon adjourned at 4:53 o'clock P.M.) [32]

The following instruction was requested in behalf of the defendant in writing:

"U.S.

vs.

WILBUR ROISUM

DEFENDANT'S REQUESTED INSTRUCTION

"Defendant requests the following instruction to be given by Court to Jury:

I.

"The Court hereby instructs you that if you find that Local Board #1, Yakima County, Sunny-side, Wash. erroneously classified defendant in Class IV-E, that their order issued to defendant to report to the C.P.S. Camp was void and your verdict should be 'not guilty'." [33]

The Court: Will you have the defendants stand, both of them.

(The two defendants here stood.)

The Court: I have gone through both the files in these cases, and of course had the questions that have been argued presented at the trial and reserved them for further consideration, which has now been given.

The motions that are before me are for judgments of acquittal notwithstanding the verdict, and, in the alternative, for a new trial.

In the Roisum case I find no ground to support the [71] defendant's motion and the action of the Court will be the same as in other cases. The defendant Roisum will be committed to the custody of the Attorney General of the United States for imprisonment for a period of two years, and for the execution of the sentence he will be remanded to the custody of the Marshal.

In the other case, the Agan case, I find no ground for the action of the Draft Board in classifying a man as a conscientious objector when he has not claimed it, and the motion will be allowed in that case, and a judgment of acquittal will be entered and the defendant discharged.

Mr. Lessard: May it please the Court, in the Roisum case, due to the fact that we feel that a substantial question has been raised, if we determine to ~~appear~~ will the Court set bond on appeal?

The Court: Well, not right now. After you and the District Attorney have consulted I will hear you on that.

Mr. Hazlett: In the Agan case, do I understand that the motion, or the order of acquittal, disposes entirely of the defendant?

The Court: That is right.

Mr. Hazlett: Wipes the indictment off?

The Court: Yes.

Mr. Hazlett: Well, that is very agreeable to the United States Attorney. [72]

(Thereupon, the foregoing hearing was concluded at 11:10 o'clock A.M.)

[Endorsed]: Filed Dec. 7, 1944. [73]

[Title of District Court and Cause:]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that on Tuesday, October 17, 1944, I reported in shorthand all oral proceedings had, all evidence given and the charge of the Court, all objections made and rulings thereon and exceptions taken, upon the trial of the above entitled cause, before the Honorable Claude McColloch, Judge of said Court, and a jury duly impaneled and sworn, and thereafter had prepared under my direct supervision a typewritten transcript from my shorthand notes, and the first thirty-three pages of the foregoing and hereto attached typewritten transcript, numbered 1 to 33, both inclusive, contain a full, true and accurate record of all of the oral proceedings had, all evidence given, objections and motions made, rulings thereon and exceptions taken upon said trial, except the examination in the impaneling of the jury.

I further certify that I reported in shorthand all of the oral proceedings had and arguments made upon the hearing [74] of the motions made in behalf of the defendants in the cases of United States of America v. Harold Ray Agan, defendant, No. C-16522, and United States of America v. Wilbur Roisum, defendant No. C-16542, which were heard together before the Honorable Claude McColloch, Judge of said Court, on Friday, November 3, 1944, and thereafter had prepared from my shorthand notes a typewritten transcript, and that portion of

the foregoing and hereto attached transcript bearing page numbers 34 to 73, both inclusive, contains a full, true and accurate record of all the arguments presented and oral proceedings had upon the hearing of said motions, and the sentences passed by the Court upon the defendants at said time.

Dated at Portland, Oregon, this 1st day of December, A.D. 1944.

ALVA W. PERSON

Court Reporter. [75]

[Endorsed]: No. 10942. United States Circuit Court of Appeals for the Ninth Circuit. Wilbur Roisum, Appellant. vs. United States of America, Appellee. Transcript of Record. Upon appeal from the District Court of the United States for the District of Oregon.

Filed December 29, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10942

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Appellant hereby adopts as the points upon which he intends to rely on appeal, the statement of points appearing in the transcript of the record herein, which are the same points as set forth in his Assignment of Errors, also appearing in the transcript herein.

Dated at Portland, this 5th day of January, 1945.

DELLMORE LESSARD

Attorney for appellant.

Received a copy of above this 5th day of January, 1945.

CARL C. DONAUGH

U.S. District Attorney

By **MARIE DRUMEFF**

[Endorsed]: Filed Jan. 8, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

**DESIGNATION OF PARTS OF RECORD TO
BE PRINTED IN TRANSCRIPT**

Appellant hereby designates the following parts of the record, which he thinks necessary for the consideration of this appeal, to be printed in the transcript herein, to-wit:

1. Indictment
2. Record of plea of "Not Guilty"
3. All exhibits
4. Verdict of Jury
5. Judgment of Court and sentence
6. All of transcript of testimony and trial proceedings, except page 34 to page 71, inclusive, where the following appears, "The Court: Will you have the defendants stand, both of them." And to print the remainder of said transcript beginning with said quotation by the Court, showing for the portion deleted that the Court listened to the argument of counsel for both parties hereto.
7. Notice of Appeal
8. Assignment of Errors
9. Bill of Exceptions
10. All orders extending time
11. Statement of points upon which appellant intends to rely
12. Praecipe to Clerk of District Court
13. This designation.

Dated at Portland, Oregon, this 5th day of January, 1945.

DELLMORE LESSARD

Attorney for appellant.

Received a copy of above this 5th day of January, 1945.

CARL C. DONAUGH

U.S. District Attorney

By **MARIE DRUMEFF**

[Endorsed]: Filed Jan. 8, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

**ORDER THAT EXHIBITS NEED NOT
BE PRINTED**

Good cause therefor appearing, It Is Ordered that all of the original exhibits in above cause need not be printed, but may be considered by the Court in their original form.

FRANCIS A. GARRECHT

United States Circuit Judge.

Dated: San Francisco, Calif., January 24, 1945.

[Endorsed]: Filed Jan. 24, 1945. Paul P. O'Brien,
Clerk.

No. 10942

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court of the United States
for the District of Oregon**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals for the
Ninth Circuit

Excerpt from Proceedings of Monday, September
17, 1945.

Before: Stephens, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Dellmore
Lessard, counsel for appellant, and by Mr. E. H. Cas-
terlin, Assistant United States Attorney, counsel for
appellee, and submitted to the court for consideration
and decision.

United States Circuit Court of Appeals for the
Ninth Circuit

Excerpt from Proceedings of Friday, September
27, 1947.

Before: Stephens, Healy and Bone,
Circuit Judges.

[Title of Cause.]

**ORDER WITHDRAWING OPINION, SETTING
ASIDE JUDGMENT AND RESUBMITTING
CAUSE**

The opinion of this Court heretofore filed on the
5th day of April, 1946, in the above entitled matter

is withdrawn. The decision entered in accord with the referred to opinion is hereby set aside. The appeal is hereby submitted to the court for opinion and decision upon the oral argument made and the briefs heretofore filed upon the appeal and upon the briefs heretofore filed on the motion for a rehearing.

United States Circuit Court of Appeals for the
Ninth Circuit

Excerpt from Proceedings of Friday, October 4,
1946.

Before: Stephens, Healy and Bone,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,917

WESLEY WILLIAM COX,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 10,928

THEODORE ROMAIN THOMPSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeals from the District Court of the United
States for the District of Idaho

No. 10,942

Oct. 4, 1946

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon

Before: Stephens, Healy and Bone,
Circuit Judges.

Stephens, Circuit Judge.

OPINION

These cases were heretofore decided; but upon petition of the United States this court set aside its decision and withdrew its opinion and ordered the cases resubmitted upon the original briefs and argument, supplemented by the briefs filed for and against the petition for rehearing.

Wesley William Cox and Theodore Romaine Thompson were indicted by a United States Grand Jury in the District of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U.S.C.A. App. § 311. Wilbur Roisum was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the inditees was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance (§ 309a)

as he should be directed to perform. After various happenings, which we need not here relate, each registrant proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby the registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed the administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or services under the Act and from the jurisdiction of a board to issue any order directed to him. Section 305(d) acts to exempt "regular and duly ordained ministers of religion" from training or service but not from registration.

Appellants' claims as to exemption were at all times consistently, persistently and openly made by each registrant. These claims were the subject of competent proof to the boards through the registrants' questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of

religious training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants, the boards treated their claims as ministers arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal.

It is settled that the defense in the trial under § 311 upon this phase of the case can only go to the jurisdiction of the board¹ or to the inquiry as to whether or not the board discriminated against the registrant or considered his case arbitrarily or capriciously. While the courts have the power to convict or acquit in accordance with the evidence on these issues, they have no power to try the issue of classification de novo. Since in each case under treatment in this opinion the evidence on the classi-

¹Estep v. United States (No. 292) and Smith v. United States (No. 66), U. S.; Billings v. Truesdell, 321 U. S. 542 (1944); Falbo v. United States, 320 U. S. 549 (1944).

fication issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely.

As stated by Mr. Justice Frankfurter in his opinion, concurring in the decision but not in the opinion of the majority of the court in *Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), U. S. (1946), the controversial doctrine of jurisdiction of fact, treated in *Crowell v. Benson*, 285 U. S. 22 (1932), is suggested. That is, since ministers of religion are exempted from any service, the registrant under trial for violating § 311 may show the fact to be that he is a minister of religion and not merely that the evidence before the board was in substantial support of the board's classification. It will be recalled that it was decided in the latter case and other similar cases² that findings of fact of an administrative agency which go to the jurisdiction of the agency and which affect constitutional rights are not conclusive and may be tried by the courts de novo. Where only statutory rights are involved, as in our cases (ministers of religion have no constitutional rights to exemption from military or other service), the findings of fact are final if substan-

²See *Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Borax, Ltd. v. Los Angeles*, 296 U. S. 10 (1935); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936).

tially supported by evidence before the agency. See
So. Chicago Co. v. Bassett, 309 U. S. 251 (1940).³

Finding no error in any one of the three cases
treated in this opinion, the judgments are affirmed.

Affirmed.

[Endorsed]: Opinion. Filed Oct. 4, 1946. Paul
P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10942

WILBUR ROISUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon appeal from the District Court of the
United States for the District of Oregon.

This cause came on to be heard on the Transcript
of the Record from the District Court of the United

³See also *Railroad Com'n. v. Rowan & Nichols Oil Co.*, 311 U. S. 570 (1941); *Local Draft Board No. 1 v. Connors* (CCA 9, 1941), 124 Fed 2d 388; *Gudmundson v. Cardillo* (CCA D. C., 1942), 126 Fed. 2d 521; *Goff v. United States* (CCA 4, 1943), 135 Fed 2d 610; *United States v. Messersmith* (CCA 7, 1943), 138 Fed. 2d 599.

States for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Oct. 4, 1946.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday,
March 20, 1947

Before: Stephens, Healy and Bone, Circuit Judges.

[Title of Cause.]

**ORDER DENYING PETITION
FOR REHEARING**

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed January 6, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

(Clerk's Note: for contents of petition for rehearing, see transcript of record in companion cause, Wesley Wm. Cox vs. U. S. A., pages 64 to 72.)

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED
UNDER RULE 38 OF THE REVISED
RULES OF THE SUPREME COURT OF
THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-seven (67) pages, numbered from and including 1 to and including 67, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of March, 1947.

[Seal]

PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 9, 1947.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. The case is consolidated for argument with Cox vs. United States and Thompson vs. United States, Nos. 1256 and 1257.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1452)

FILE COPY

U.S. Supreme Court, U.S.
FILED
APR 17 1947

No. **1256** 66

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

WESLEY WILLIAM COX, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Ninth Circuit**

HAYDEN C. COVINGTON
Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

WESLEY WILLIAM COX, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Wesley William Cox petitions this Court for a writ of certiorari.* He shows unto the Court as follows:

1. Opinion of the court below.

The opinion of the United States Circuit Court of Appeals reversing the judgment in this case is not reported. The opinion does not appear in the record, but it appears as Appendix to this petition. The opinion was withdrawn by an order of the court dated September 27, 1946. [54] ** The opinion of the court below affirming the judgment of conviction is reported at 157 F. 2d 787..It appears in the record. [56-61]

* The petitions in the two companion cases (Thompson v. United States and Roisum v. United States) immediately following this one are identical in every respect with the petition in this case.

** Bracketed figures appearing in this petition refer to pages of printed transcript of record.

2. Jurisdiction.

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

3. Timeliness of this petition.

Judgment of affirmance was rendered and entered October 4, 1946. [61-62] The time for filing petition for writ of rehearing was enlarged. [73] Petition for rehearing was duly filed within the time fixed by the order extending the time for filing petition. [63-72] The petition for rehearing was denied March 20, 1947. [73] This petition for writ of certiorari is filed within thirty days from the date the judgment of affirmance became final.

4. Statutes and Regulations involved.

Sections 3. (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.3, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

5. Questions presented.

(1) Did the court below err in holding that the judgment of conviction should be affirmed because the denial of petitioner's right to be heard on his attack against the validity of the draft board proceedings was immaterial and harmless error in that there was basis in fact for the classification given by the draft boards?

(2) Did the court below err in failing to hold that the undisputed evidence in this case showed that the denial of petitioner's claim for exemption from training and service as a minister of religion was without basis in fact and in excess of the jurisdiction of the draft boards?

(3) Did the court below err in holding that the trial court could not consider *de novo* evidence in determining whether the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended.

[2] The indictment charges that on May 26, 1944, being an assignee of a civilian public service camp located at Downey, Idaho, petitioner unlawfully did desert, leave and depart from said camp. [2-3] Petitioner pleaded "not guilty". [3] He was tried to a jury before the court on October 24, 1944. [5-28] At the close of the Government's case petitioner moved for a directed verdict. [19] The motion was denied with exception. [19] At the close of all the evidence, petitioner renewed his motion for directed verdict. [39-40] The case was argued to the jury. [24] The court instructed the jury. [24-28] Petitioner duly submitted requested instruction to the court, which was denied with exception. [40] The jury retired and returned its verdict of guilty. [4, 28] By judgment petitioner was committed to the custody of the Attorney General for a period of three years and three months and fined \$300.00. [4-5] Petitioner duly served and filed his notice of appeal. [28-30] He was admitted to bail pending appeal. [30-35] He timely filed his assignments of error. [35-37] Bill of exceptions, pre-

serving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [38-43] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being later affirmed.

FACTS

Petitioner was classified as a conscientious objector and ordered to a civilian public service camp, there to perform such work of national importance as he should be directed to perform.* He reported. Within fifteen or twenty minutes after arriving, petitioner left without permission and intentionally remained away. [57-58] (Also see Appendix.)

Petitioner claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained minister of religion exempted him from any training and service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 5 (d) of the Act (50 U. S. C. App. 305 (d)) acts to exempt "regular and duly ordained ministers of religion" from training and service but not from registration. [58-59]

Petitioner's claims as to exemption were at all times consistently, persistently and openly made by him. These claims were the subject of competent proof to the boards through his questionnaire, and evidence was presented at board hearings that, although the petitioner was conscientiously opposed to war by reason of religious training and belief, he was a minister, and requests were made for classification as such. Notwithstanding all of this, petitioner says that the boards treated his claim as a minister arbi-

* The facts stated here are taken, verbatim from the opinion of the Court of Appeals. Since the facts stated by the court below present the issue here there has been no attempt to detail the facts from the evidence in the record.

arbitrarily and capriciously, and proceeded to classify him as a conscientious objector. [58-59] (Appendix)

At the trial all of the proffered evidence relevant to petitioner's claimed status as a minister of religion was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. The appropriate steps were taken entitling petitioner to maintain appeals. [59] (Appendix)

With respect to the "competent and substantial" evidence before the boards pertaining to petitioner's ministerial status, the undisputed evidence in the draft board file showed that he was a duly ordained minister of Jehovah's witnesses, regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses.* It revealed that he was regarded by other of Jehovah's witnesses as standing in relation to Jehovah's witnesses and the Watchtower Bible and Tract Society (a religious organization recognized by the Selective Service System) as do the orthodox clergy to their respective religious denominations. There was absolutely no evidence to the contrary in the draft board file and in no respect was petitioner's evidence or his claim for exemption impeached and discredited before the draft boards. The undisputed evidence, therefore, showed that the determination of the draft boards denying petitioner his claim for exemption as a minister of religion was arbitrary and capricious, being in violation of due process of law. [8-24]

* The facts in this paragraph are not taken from the opinion but from the record filed in this case.

How Issues Raised

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of the Government's case [19] and again at the close of all the evidence [39-40] petitioner moved for an instructed verdict and for a judgment of acquittal, on the grounds that the undisputed evidence showed the draft board order to be void. [19, 39-40] Each motion was denied with exception to petitioner. [19, 39-40, 43]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [40] The requested charge was refused, with exception allowed. [40]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner departed and deserted from the camp without proper authority to do so. The jury was instructed that if the evidence established that petitioner left the camp without such authority he would be guilty. [27] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [27] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [26-27] The trial court specifically instructed the jury as follows:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set-out in the indictment, which has been read to you and which you may take to the jury room.

7
"If you find that the Government has proved these allegations then you will find the defendant guilty as charged, otherwise you will acquit him."

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant."

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho." [26-27, 40-41]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (Appendix)

On October 4, 1946, the court below said: "At the trials all of the proffered evidence to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal." [59]

Specifications of Error

The Circuit Court of Appeals for the Ninth Circuit erred—

(1) In holding that the ruling of the trial court to the effect that the illegality of the draft board proceedings was not material as a defense and that such ruling was harmless error because the draft board proceedings showed that the classification was not without basis in fact and was within the jurisdiction of the agency.

(2) In refusing to follow the decisions of this Court in *Estep v. United States*, 327 U. S. 114; *Smith v. United States*, 327 U. S. 114; *Gibson v. United States*, 67 S. Ct. 301; *Dodsz v. United States*, 67 S. Ct. 301.

(3) In holding that there was basis in fact for the classification given petitioner by the draft boards when the undisputed evidence showed that petitioner was exempt from training and service as a minister of religion under Section 5 (d) of the Act.

(4) In holding that *de novo* evidence could not be considered by the trial court in determining whether or not the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion under Section 5 (d) of the Act.

(5) In affirming the judgment of conviction.

Reasons Relied on for Granting the Writ

The decision of the court below is in direct conflict with the holdings of this Court in *Estep v. United States*, 327 U. S. 114; *Smith v. United States*, 327 U. S. 114; *Gibson v. United States*, 67 S. Ct. 301; and *Dodez v. United States*, 67 S. Ct. 301. The facts in this case are identical to the facts in the *Gibson* case in so far as the proceedings by the draft boards are concerned and the extent to which the registrant went in order to exhaust his administrative remedies. The difference between this case and the *Gibson* case is that in this case the court allowed all of the draft board file to go into evidence whereas in the *Gibson* case the draft board file was excluded, along with *de novo* evidence. However, the facts in this case in respect to the rulings of the trial court are identical with the facts in the *Dodez* case. In the *Dodez* case, as in this case, the draft board file was received into evidence. Some *de novo* evidence and other proof with respect to the denial of due process of law by the draft board was excluded from evidence. In the *Dodez* case, as in this case, the petitioner urged a motion for directed verdict on the ground that the undisputed evidence appearing in the draft board file established that the petitioner was exempt as a minister of religion from all training and service and, therefore, the prosecution should be dismissed. Inasmuch as the trial court in this case withheld from consideration in the trial court by the court or jury whether the draft boards exceeded their jurisdiction or denied petitioner's claim for exemption without basis in fact, a new trial should have been ordered by the court below as this Court directed in the *Estep*, *Smith*, *Gibson* and *Dodez* cases.

A proper opinion was expressed and a correct disposition of this case was made by the court below in its opinion of April 5, 1946. (Appendix)

Following the rendition of that decision, the Govern-

ment, acting by and through an Assistant Attorney General and attorneys of the Department of Justice, filed a joint petition for rehearing in this and in the two companion cases strongly urging to the court below that the judgment in this case should properly be affirmed because the undisputed evidence appearing from the draft board file showed that petitioner was not illegally classified by the draft boards and, therefore, the holding of the district court was harmless error. Accordingly, the court below was erroneously requested to set aside its judgment and affirm the judgment of the district court.

This was identically the same argument that the Government unsuccessfully made to this Court in the *Smith* case and again in its "Brief for the United States on Reargument" at pages 39-56 in *Gibson v. United States*, No. 23, October Term 1946.

On October 4, 1946, the court below accepted this specious and factitious argument of the Government and set aside its decision of April 5, 1946, withdrawing the same, and ordered the judgment of conviction affirmed.

Thereupon petitioner filed his petition for rehearing, calling attention to the fact that the cases of *Gibson v. United States* and *Dodez v. United States* had been decided by this Court on December 23, 1946, in which it was held, on circumstances and facts identical to the facts in this case, that the judgments of conviction should be reversed and new trials ordered. See Appellants' Joint Petition for Rehearing filed in this case. [64-72]

In view of the extraordinarily deliberate and intentional departure from the decisions of this Court and the attempted *sub silentio* "overruling" of the decisions of this Court in the *Estep*, *Smith*, *Gibson* and *Dodez* cases, this Court should, simultaneously with the granting of the writ of certiorari, reverse the judgment of the court below and order the judgment of the district court reversed and

remanded for a new trial. This should be ordered on the ground that the decision of the court below on April 5, 1946, is correct. It should be done also because the decision of the court below on October 4, 1946, is not compatible with the decisions of this Court in *Estep v. United States*, *Smith v. United States*, *Gibson v. United States*, and *Dodez v. United States*.

This action should be taken on the authority of *United States v. Balogh*, 67 S. Ct. 625; rehearing denied 67 S. Ct. 633. See also *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715; rehearing denied 320 U. S. 816.

The petition for writ of certiorari also should be granted because the decision of the court below is directly in conflict with the decision of the Fourth Circuit Court of Appeals in *Poole v. United States*, decided January 28, 1947, — F. 2d —.

In holding that there was basis in fact for the classification given petitioner, the court below has passed upon an important question of federal law which has not been, but which should be decided by this Court. There is substance and merit to petitioner's contention that he was exempt as a minister of religion and that there was no basis in fact for the classification given him by the draft boards in this case. See the extensive argument upon this question at pages 83-131 in Joint Brief for Respondent Kulick and Petitioner Sunal in No. 840, October Term 1946, *Alexander v. United States ex rel. Kulick*; and No. 535, October Term 1946, *Sunal v. Large*.

The ruling of the court below that *de novo* evidence was not receivable in the trial court for the purpose of determining whether or not the draft boards exceeded their jurisdiction in ordering petitioner, who was, as a minister of religion, exempt from training and service, to report to the civilian public service camp in question, is a decision

upon an important question of federal law which has not been, but which should be, decided by this Court.

Moreover, the question is analogous to that decided by this Court in *Kessler v. Strecker*, 307 U. S. 22, 34-35; *Chin Yow v. United States*, 208 U. S. 8, 13. To the extent that this particular question here presented as to whether *de novo* evidence should have been received is analogous to that involved in the cases just cited, the decision of the court below is a departure from and in conflict with applicable decisions of this Court. For this reason also the petition for writ of certiorari should be granted.

Conclusion

For the reasons stated, petitioner submits that the writ of certiorari prayed for herein should be granted. He further prays that, in the circumstances of this case, it would be appropriate for this Court to reverse the judgment below and order the judgment of the trial court reversed and the cause remanded for a new trial without further briefs or argument.

Respectfully submitted,
WESLEY WILLIAM COX
Petitioner

HAYDEN C. COVINGTON
Counsel for Petitioner

Appendix**UNITED STATES CIRCUIT COURT OF APPEALS****NINTH CIRCUIT**

No. 10,917

Wesley William Cox, *Appellant*

v.

United States of America, *Appellee*

No. 10,928

Theodore Romaine Thompson, *Appellant*

v.

United States of America, *Appellee*

Upon Appeal from the District Court of the United States
for the District of Idaho

No. 10,942

Wilbur Roisum, *Appellant*

v.

United States of America, *Appellee*

Upon Appeal from the District Court of the United States
for the District of Oregon

April 5, 1946

Before: STEPHENS, HEALY and BONE, Circuit Judges.

STEPHENS, Circuit Judge.

Wesley William Cox and Theodore Romaine Thompson
were indicted by a United States Grand Jury in the District

of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U. S. C. A. App. § 311. Wilbur Roisum was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the inditees was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance (§ 309 a) as he should be directed to perform. After various happenings, which we need not here relate, each registrant proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived at camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby the registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or service under the Act and from the jurisdiction of a board to issue any order directed to him.

It will be seen that § 305 (d) acts to exempt "regular and duly ordained ministers of religion" from training or

service but not from registration. The claim mentioned was at all times consistently, persistently and openly made by each registrant. It was the subject of competent proof to the boards through the registrant's questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of religious training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants here, the boards treated their claims as ministers, arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals.

After oral argument this court was informed that the Supreme Court of the United States would soon decide two cases, which, it was thought, would control the cases here under consideration. The cases referred to, *Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), 327 U. S. 144, were treated together and decided on February 4, 1946, in a majority, consolidated opinion.

In the case of *Estep v. United States*, the registrant sought in the trial court to defend against a charge that he had wilfully refused to submit to induction into the Navy on the ground that he was an ordained Jehovah's Witness minister of religion and that he had been improperly denied exemption from service by the classifying agencies in arbitrarily and capriciously refusing to fix his classification as IV-D [minister of religion, § 305 (d)]. (Another ground was presented which we need not consider.) This defense was rejected.

It will be seen that the *Estep* case parallels the instant cases, with the difference that *Estep* was directed to be inducted into one of the armed forces, whereas the three registrants here were directed to go to, and remain in, conscientious objector's camp. In each case (the *Estep* and our cases) the registrant proceeded to the place to which he was ordered. *Estep* went to the place of induction, where he refused to obey the board's order to submit to induction and, therefore, retained his civilian status. Each registrant in our cases went to camp, retaining his civilian status, but each refused to continue performance of board orders. On the face of these facts each registrant remained a civilian and as such appeared to have committed an offense against the United States under § 311.

In the *Estep* and *Smith* opinion it is said that the Supreme Court in *Falbo v. United States*, 320 U. S. 549 (1944), held that a registrant could not defend in a criminal case under § 311 "on the ground that he was wrongly classified and was entitled to a statutory exemption for failure to report for induction into the armed forces or for work of national importance," and that it was therein further held that there is no judicial review of a registrant's classification short of his acceptance for service. All administrative steps must first be taken.

The question posed in the *Estep* case was: Is there a judicial review of a classification in a prosecution under § 311, where the registrant reported, was accepted, but refused to submit to induction? The difference between the *Estep* case and our cases does not distinguish them in principle.

There has been considerable doubt entertained by the courts as to whether or not submission to induction is an administrative step, necessary to be taken before any judicial process can be put to the aid of the registrant under a board's order, but this doubt has been put at rest. Sec-

tion 311 makes a wilful failure to perform any duty required of a registrant by the Act, the rules or regulations, an offense. And it is said in *Billings v. Truesdell*, 321 U. S. 542 (1944), that an order to report for induction is such a duty, and it includes the duty to submit to induction. The *Estep* and *Smith* opinion holds that "Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." (Emphasis ours.)

It is also held in the *Estep* and *Smith* opinion that the board's authority to hear and determine all questions of deferment or exemption is limited to action within its jurisdiction [§310 (a) (2)], but if outside the board's jurisdiction, its decision would not be final [citing *Tung v. United States*, 142 Fed. 2d 919 (CCA-1, 1944)]. Again, "If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service because he was a Jew, or a German, or a Negro, it would act in defiance of law." And, "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." In all such cases its action would be lawless and beyond its jurisdiction.

Thus, if a registrant who was an exempt minister, and who was ordered to report to an induction center for induction, or to a camp, there to remain and perform work of national importance, obeyed the order by proceeding to the designated place, but disobeyed it by refusing induction or by refusing to remain in camp, he could defend against a charge under § 311 with proof of his exempt status.

In referring to § 310 (a) (2), which provides that the board's orders are final, the Supreme Court says in the *Estep* and *Smith* opinion: "It means that the courts are

not to weigh the evidence to determine whether the classification made by the local boards was justified." It is obvious that this comment is directed to classifications within the board's jurisdiction.

The *Estep* and *Smith* opinion concludes with the statement: "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried.

○ Reversed and remanded.

(Endorsed:)

Opinion. Filed April 5, 1946. Paul P. O'Brien, Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

THEODORE ROMAIN THOMPSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

**Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Ninth Circuit**

HAYDEN C. COVINGTON

Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

THEODORE ROMAINÉ THOMPSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Theodore Romainé Thompson petitions this Court for a writ of certiorari.* He shows unto the Court as follows:

1. Opinion of the court below.

The opinion of the United States Circuit Court of Appeals reversing the judgment in this case is not reported. The opinion does not appear in the record, but it appears as Appendix to this petition. The opinion was withdrawn by an order of the court dated September 27, 1946. [57-58] ** The opinion of the court below affirming the judgment of conviction is reported at 157 F. 2d 787. It appears in the record, [59-64]

* This petition is identical in every respect with the petition in *Cox v. United States*, the first of this group of three companion cases.

** Bracketed figures appearing in this petition refer to pages of printed transcript of record.

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

3. *Timeliness of this petition.*

Judgment of affirmance was rendered and entered October 4, 1946. [64-65] The time for filing petition for writ of rehearing was enlarged. [65] Petition for rehearing was duly filed within the time fixed by the order extending the time for filing petition. [65] The petition for rehearing was denied March 20, 1947. [65] This petition for writ of certiorari is filed within thirty days from the date the judgment of affirmance became final.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.3, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

5. *Questions presented.*

(1) Did the court below err in holding that the judgment of conviction should be affirmed because the denial of petitioner's right to be heard on his attack against the validity of the draft board proceedings was immaterial and harmless error in that there was basis in fact for the classification given by the draft boards?

(2) Did the court below err in failing to hold that the undisputed evidence in this case showed that the denial of petitioner's claim for exemption from training and service as a minister of religion was without basis in fact and in excess of the jurisdiction of the draft boards?

(3) Did the court below err in holding that the trial court could not consider *de novo* evidence in determining whether the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on April 18, 1944, being an assignee of a civilian public service camp located at Downey, Idaho, petitioner unlawfully did desert, leave and depart from said camp. [2-3] Petitioner pleaded "not guilty". [3] He was tried to a jury before the court on October 24, 1944. [6-33] At the close of the Government's case petitioner moved for a directed verdict. [23] The motion was denied with exception. [24] At the close of all the evidence, petitioner renewed his motion for directed verdict. [28-29] The case was argued to the jury. [28] The court instructed the jury. [29-33] Petitioner duly submitted requested instruction to the court, which was denied with exception. [32-33, 45] The jury retired and returned its verdict of guilty. [4, 33] By judgment petitioner was committed to the custody of the Attorney General for a period of three years and three months and fined \$300.00. [4-5] Petitioner duly served and filed his notice of appeal. [33-34] He was admitted to bail pending appeal. [35-40] He timely filed his assignments of error. [40-42] Bill of excep-

tions, preserving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [42-48] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being first reversed and later affirmed.

FACTS

Petitioner was classified as a conscientious objector and ordered to a civilian public service camp, there to perform such work of national importance as he should be directed to perform.* He reported. Within fifteen or twenty minutes after arriving, petitioner left without permission and intentionally remained away. [60-61] (Also see Appendix.)

Petitioner claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained minister of religion exempted him from any training and service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 5 (d) of the Act (50 U. S. C. App. 305 (d)) acts to exempt "regular and duly ordained ministers of religion" from training and service but not from registration. [61-62]

Petitioner's claims as to exemption were at all times consistently, persistently and openly made by him. These claims were the subject of competent proof to the boards through his questionnaire, and evidence was presented at board hearings that, although the petitioner was conscientiously opposed to war by reason of religious training and belief, he was a minister, and requests were made for classification as such. Notwithstanding all of this, petitioner says that the boards treated his claim as a minister arbi-

* The facts stated here are taken verbatim from the opinion of the Court of Appeals. Since the facts stated by the court below present the issue here there has been no attempt to detail the facts from the evidence in the record.

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trarily and capriciously, and proceeded to classify him as a conscientious objector. [61-62] (Appendix)

At the trial all of the proffered evidence relevant to petitioner's claimed status as a minister of religion was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. The appropriate steps were taken entitling petitioner to maintain appeals. [62] (Appendix)

With respect to the "competent and substantial" evidence before the boards pertaining to petitioner's ministerial status, the undisputed evidence in the draft board file showed that he was a duly-ordained minister of Jehovah's witnesses, regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses.* It revealed that he was regarded by other of Jehovah's witnesses as standing in relation to Jehovah's witnesses and the Watchtower Bible and Tract Society (a religious organization recognized by the Selective Service System) as do the orthodox clergy to their respective religious denominations. There was absolutely no evidence to the contrary in the draft board file and in no respect was petitioner's evidence or his claim for exemption impeached and discredited before the draft boards. The undisputed evidence, therefore, showed that the determination of the draft boards denying petitioner his claim for exemption as a minister of religion was arbitrary and capricious, being in violation of due process of law. [6-29] .

* The facts in this paragraph are not taken from the opinion but from the record filed in this case.

How Issues Raised

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of the Government's case [23] and again at the close of all the evidence [28-29] petitioner moved for an instructed verdict and for a judgment of acquittal, on the grounds that the undisputed evidence showed the draft board order to be void. [23, 28-29] Each motion was denied with exception to petitioner. [24, 28-29]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [32, 33, 45] The requested charge was refused, with exception allowed. [32, 33, 45]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner departed and deserted from the camp without proper authority to do so. The jury was instructed that if the evidence established that petitioner left the camp without such authority he would be guilty. [31-32] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [31-32] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [31-32] The trial court specifically instructed the jury as follows:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

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"If you find that the Government has proved these allegations then you will find the defendant guilty as charged, otherwise you will acquit him.

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho." [31-32, 45-46]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (Appendix)

On October 4, 1946, the court below said: "At the trials all of the proffered evidence to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal." [62]

Specifications of Error

The Circuit Court of Appeals for the Ninth Circuit erred—

(1) In holding that the ruling of the trial court to the effect that the illegality of the draft board proceedings was not material as a defense and that such ruling was harmless error because the draft board proceedings showed that the classification was not without basis in fact and was within the jurisdiction of the agency.

(2) In refusing to follow the decisions of this Court in *Estep v. United States*, 327 U. S. 114; *Smith v. United States*, 327 U. S. 114; *Gibson v. United States*, 67 S. Ct. 301; *Dodez v. United States*, 67 S. Ct. 301.

(3) In holding that there was basis in fact for the classification given petitioner by the draft boards when the undisputed evidence showed that petitioner was exempt from training and service as a minister of religion under Section 5 (d) of the Act.

(4) In holding that *de novo* evidence could not be considered by the trial court in determining whether or not the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion under Section 5 (d) of the Act.

(5) In affirming the judgment of conviction.

Reasons Relied on for Granting the Writ

The decision of the court below is in direct conflict with the holdings of this Court in *Estep v. United States*, 327 U. S. 114; *Smith v. United States*, 327 U. S. 114; *Gibson v. United States*, 67 S. Ct. 301; and *Dodez v. United States*, 67 S. Ct. 301. The facts in this case are identical to the facts in the *Gibson* case in so far as the proceedings by the draft boards are concerned and the extent to which the registrant went in order to exhaust his administrative remedies. The difference between this case and the *Gibson* case is that in this case the court allowed all of the draft board file to go into evidence whereas in the *Gibson* case the draft board file was excluded, along with *de novo* evidence. However, the facts in this case in respect to the rulings of the trial court are identical with the facts in the *Dodez* case. In the *Dodez* case, as in this case, the draft board file was received into evidence. Some *de novo* evidence and other proof with respect to the denial of due process of law by the draft board was excluded from evidence. In the *Dodez* case, as in this case, the petitioner urged a motion for directed verdict on the ground that the undisputed evidence appearing in the draft board file established that the petitioner was exempt as a minister of religion from all training and service and, therefore, the prosecution should be dismissed. Inasmuch as the trial court in this case withheld from consideration in the trial court by the court or jury whether the draft boards exceeded their jurisdiction or denied petitioner's claim for exemption without basis in fact, a new trial should have been ordered by the court below as this Court directed in the *Estep*, *Smith*, *Gibson* and *Dodez* cases.

A proper opinion was expressed and a correct disposition of this case was made by the court below in its opinion of April 5, 1946. (Appendix)

Following the rendition of that decision, the Govern-

ment, acting by and through an Assistant Attorney General and attorneys of the Department of Justice, filed a joint petition for rehearing in this and in the two companion cases strongly urging to the court below that the judgment in this case should properly be affirmed because the undisputed evidence appearing from the draft board file showed that petitioner was not illegally classified by the draft boards and, therefore, the holding of the district court was harmless error. Accordingly, the court below was erroneously requested to set aside its judgment and affirm the judgment of the district court.

This was identically the same argument that the Government unsuccessfully made to this Court in the *Smith* case and again in its "Brief for the United States on Reargument" at pages 39-56 in *Gibson v. United States*, No. 23, October Term 1946.

On October 4, 1946, the court below accepted this specious and factitious argument of the Government and set aside its decision of April 5, 1946, withdrawing the same, and ordered the judgment of conviction affirmed.

Thereupon petitioner filed his petition for rehearing, calling attention to the fact that the cases of *Gibson v. United States* and *Dodez v. United States* had been decided by this Court on December 23, 1946, in which it was held, on circumstances and facts identical to the facts in this case, that the judgments of conviction should be reversed and new trials ordered. See Appellants' Joint Petition for Rehearing filed in this case. [65]

In view of the extraordinarily deliberate and intentional departure from the decisions of this Court and the attempted *sub silentio* "overruling" of the decisions of this Court in the *Estep*, *Smith*, *Gibson* and *Dodez* cases, this Court should, simultaneously with the granting of the writ of certiorari, reverse the judgment of the court below and order the judgment of the district court reversed and

remanded for a new trial. This should be ordered on the ground that the decision of the court below on April 5, 1946, is correct. It should be done also because the decision of the court below on October 4, 1946, is not compatible with the decisions of this Court in *Estep v. United States*, *Smith v. United States*, *Gibson v. United States*, and *Dodez v. United States*.

This action should be taken on the authority of *United States v. Bale*, 67 S. Ct. 625; rehearing denied 67 S. Ct. 633. See also *B'herhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715; rehearing denied 320 U. S. 816.

The petition for writ of certiorari also should be granted because the decision of the court below is directly in conflict with the decision of the Fourth Circuit Court of Appeals in *Poole v. United States*, decided January 28, 1947, — F. 2d —.

In holding that there was basis in fact for the classification given petitioner, the court below has passed upon an important question of federal law which has not been, but which should be decided by this Court. There is substance and merit to petitioner's contention that he was exempt as a minister of religion and that there was no basis in fact for the classification given him by the draft boards in this case. See the extensive argument upon this question at pages 83-131 in Joint Brief for Respondent Kulick and Petitioner Sunal in No. 840, October Term 1946, *Alexander v. United States ex rel. Kulick*; and No. 535, October Term 1946, *Sunal v. Large*.

The ruling of the court below that *de novo* evidence was not receivable in the trial court for the purpose of determining whether or not the draft boards exceeded their jurisdiction in ordering petitioner, who was, as a minister of religion, exempt from training and service, to report to the civilian public service camp in question, is a decision

upon an important question of federal law which has not been, but which should be, decided by this Court.

Moreover, the question is analogous to that decided by this Court in *Kessler v. Strecker*, 307 U. S. 22, 34-35; *Chin Yow v. United States*, 208 U. S. 8, 13. To the extent that this particular question here presented as to whether *de novo* evidence should have been received is analogous to that involved in the cases just cited, the decision of the court below is a departure from and in conflict with applicable decisions of this Court. For this reason also the petition for writ of certiorari should be granted.

Conclusion

For the reasons stated, petitioner submits that the writ of certiorari prayed for herein should be granted. He further prays that, in the circumstances of this case, it would be appropriate for this Court to reverse the judgment below and order the judgment of the trial court reversed and the cause remanded for a new trial without further briefs or argument.

Respectfully submitted,

THEODORE ROMAINE THOMPSON
Petitioner

HAYDEN C. COVINGTON
Counsel for Petitioner

Appendix**UNITED STATES CIRCUIT COURT OF APPEALS****NINTH CIRCUIT**

No. 10,917

Wesley William Cox, *Appellant*

v.

United States of America, *Appellee*

No. 10,928

Theodore Romaine Thompson, *Appellant*

v.

United States of America, *Appellee*

Upon Appeal from the District Court of the United States
for the District of Idaho

No. 10,942

Wilbur Roisum, *Appellant*

v.

United States of America, *Appellee*

Upon Appeal from the District Court of the United States
for the District of Oregon

April 5, 1946

Before: STEPHENS, HEALY and BONE, Circuit Judges.

STEPHENS, Circuit Judge.

Wesley William Cox and Theodore Romaine Thompson
were indicted by a United States Grand Jury in the District

of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U.S.C.A. App. § 311. Wilbur Roisum was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the inditees was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance (§ 309 a) as he should be directed to perform. After various happenings, which we need not here relate, each registrant proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived at camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby the registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or service under the Act and from the jurisdiction of a board to issue any order directed to him.

It will be seen that § 305 (d) acts to exempt "regular and duly ordained ministers of religion" from training or

service but not from registration. The claim mentioned was at all times consistently, persistently and openly made by each registrant. It was the subject of competent proof to the boards through the registrant's questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of religious training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants here, the boards treated their claims as ministers, arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals.

After oral argument this court was informed that the Supreme Court of the United States would soon decide two cases, which, it was thought, would control the cases here under consideration. The cases referred to, *Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), 327 U. S. 144, were treated together and decided on February 4, 1946, in a majority, consolidated opinion.

In the case of *Estep v. United States*, the registrant sought in the trial court to defend against a charge that he had wilfully refused to submit to induction into the Navy on the ground that he was an ordained Jehovah's Witness minister of religion and that he had been improperly denied exemption from service by the classifying agencies in arbitrarily and capriciously refusing to fix his classification as IV-D [minister of religion, § 305 (d)]. (Another ground was presented which we need not consider.) This defense was rejected.

It will be seen that the *Estep* case parallels the instant cases, with the difference that *Estep* was directed to be inducted into one of the armed forces, whereas the three registrants here were directed to go to, and remain in, conscientious objector's camp. In each case (the *Estep* and our cases) the registrant proceeded to the place to which he was ordered. *Estep* went to the place of induction, where he refused to obey the board's order to submit to induction and, therefore, retained his civilian status. Each registrant in our cases went to camp, retaining his civilian status, but each refused to continue performance of board orders. On the face of these facts each registrant remained a civilian and as such appeared to have committed an offense against the United States under § 311.

In the *Estep* and *Smith* opinion it is said that the Supreme Court in *Falbo v. United States*, 320 U. S. 549 (1944), held that a registrant could not defend in a criminal case under § 311 "on the ground that he was wrongly classified and was entitled to a statutory exemption for failure to report for induction into the armed forces or for work of national importance," and that it was therein further held that there is no judicial review of a registrant's classification short of his acceptance for service. All administrative steps must first be taken.

The question posed in the *Estep* case was: Is there a judicial review of a classification in a prosecution under § 311, where the registrant reported, was accepted, but refused to submit to induction? The difference between the *Estep* case and our cases does not distinguish them in principle.

There has been considerable doubt entertained by the courts as to whether or not submission to induction is an administrative step, necessary to be taken before any judicial process can be put to the aid of the registrant under a board's order, but this doubt has been put at rest. Sec-

tion 311 makes a wilful failure to perform any duty required of a registrant by the Act, the rules or regulations, an offense. And it is said in *Billings v. Truesdell*, 321 U. S. 542 (1944), that an order to report for induction is such a duty, and it includes the duty to submit to induction. The *Estep* and *Smith* opinion holds that "Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." (Emphasis ours.)

It is also held in the *Estep* and *Smith* opinion that the board's authority to hear and determine all questions of deferment or exemption is limited to action within its jurisdiction [§310 (a) (2)], but if outside the board's jurisdiction, its decision would not be final [citing *Tung v. United States*, 142 Fed. 2d 919 (CCA-1, 1944)]. Again, "If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service because he was a Jew, or a German, or a Negro, it would act in defiance of law." And, "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." In all such cases its action would be lawless and beyond its jurisdiction.

Thus, if a registrant who was an exempt minister, and who was ordered to report to an induction center for induction, or to a camp, there to remain and perform work of national importance, obeyed the order by proceeding to the designated place, but disobeyed it by refusing induction or by refusing to remain in camp, he could defend against a charge under § 311 with proof of his exempt status.

In referring to § 310 (a) (2), which provides that the board's orders are final, the Supreme Court says in the *Estep* and *Smith* opinion: "It means that the courts are

not to weigh the evidence to determine whether the classification made by the local boards was justified." It is obvious that this comment is directed to classifications within the board's jurisdiction.

The *Estep* and *Smith* opinion concludes with the statement: "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried.

Reversed and remanded.

(Endorsed:)

Opinion. Filed April 5, 1946. Paul P. O'Brien, Clerk.

FILE COPY

No. [REDACTED] 68

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

WILBUR ROISUM, *Petitioner*.

v.

UNITED STATES OF AMERICA, *Respondent*

**Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Ninth Circuit**

HAYDEN C. COVINGTON
Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

WILBUR ROISUM, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Wilbur Roisum petitions this Court for a writ of certiorari.* He shows unto the Court as follows:

1. Opinion of the court below.

The opinion of the United States Circuit Court of Appeals reversing the judgment in this case is not reported. The opinion does not appear in the record, but it appears as Appendix to this petition. The opinion was withdrawn by an order of the court dated September 27, 1946. [59-60].** The opinion of the court below affirming the judgment of conviction is reported at 157 F. 2d 787. It appears in the record. [62-66]

* The petitions in the two companion cases (Thompson v. United States and Cox v. United States) immediately following this one are identical in every respect with the petition in this case.

** Bracketed figures appearing in this petition refer to pages of printed transcript of record.

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

3. *Timeliness of this petition.*

Judgment of affirmance was rendered and entered October 4, 1946. [66-67] The time for filing petition for writ of rehearing was enlarged. [67] Petition for rehearing was duly filed within the time fixed by the order extending the time for filing petition. [67] The petition for rehearing was denied March 20, 1947. [67] This petition for writ of certiorari is filed within thirty days from the date the judgment of affirmance became final.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.3, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

5. *Questions presented.*

(1) Did the court below err in holding that the judgment of conviction should be affirmed because the denial of petitioner's right to be heard on his attack against the validity of the draft board proceedings was immaterial and harmless error in that there was basis in fact for the classification given by the draft boards?

(2) Did the court below err in failing to hold that the undisputed evidence in this case showed that the denial of petitioner's claim for exemption from training and service as a minister of religion was without basis in fact and in excess of the jurisdiction of the draft boards?

(3) Did the court below err in holding that the trial court could not consider *de novo* evidence in determining whether the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended.

[2] The indictment charges that on May 27, 1944, being an assignee of a civilian public service camp located at Lapine, Oregon, petitioner, after being given a limited leave of absence unlawfully did fail and refuse to return to said camp. [2-3] Petitioner pleaded "not guilty". [4] He was tried to a jury before the court on October 24, 1944. [20-50]

The court instructed the jury. [44-45, 47] Petitioner duly submitted requested instruction to the court, which was denied with exception. [45, 50] The jury retired and returned its verdict of guilty. [48-49] Petitioner thereupon filed his motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. [49] Said motion was denied. [51] By judgment petitioner was committed to the custody of the Attorney General for a period of two years.

[5-6, 51] Petitioner duly served and filed his notice of appeal. [7-8] He timely filed his assignments of error. [8-9] Bill of exceptions, preserving the questions presented upon appeal and upon this petition for writ of certiorari,

was duly and timely allowed by the trial court. [10-16] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being first reversed and later affirmed.

FACTS

Petitioner was classified as a conscientious objector and ordered to a civilian public service camp, there to perform such work of national importance as he should be directed to perform.* He reported. After arriving, petitioner was given a limited leave of absence and remained away, after his leave had expired. [62-63] (Also see Appendix.)

Petitioner claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained minister of religion exempted him from any training and service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 5 (d) of the Act (50 U. S. C. App. 305 (d)) acts to exempt "regular and duly ordained ministers of religion" from training and service but not from registration. [63]

Petitioner's claims as to exemption were at all times consistently, persistently and openly made by him. These claims were the subject of competent proof to the boards through his questionnaire, and evidence was presented at board hearings that, although the petitioner was conscientiously opposed to war by reason of religious training and belief, he was a minister, and requests were made for classification as such. Notwithstanding all of this, petitioner says that the boards treated his claim as a minister arbi-

* The facts stated here are taken verbatim from the opinion of the Court of Appeals. Since the facts stated by the court below present the issue here there has been no attempt to detail the facts from the evidence in the record.

trarily and capriciously, and proceeded to classify him as a conscientious objector. [63-64] (Appendix)

At the trial all of the proffered evidence relevant to petitioner's claimed status as a minister of religion was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. The appropriate steps were taken entitling petitioner to maintain appeals. [64] (Appendix)

With respect to the "competent and substantial" evidence before the boards pertaining to petitioner's ministerial status, the undisputed evidence in the draft board file showed that he was a duly ordained minister of Jehovah's witnesses, regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses.* It revealed that he was regarded by other of Jehovah's witnesses as standing in relation to Jehovah's witnesses and the Watchtower Bible and Tract Society (a religious organization recognized by the Selective Service System) as do the orthodox clergy to their respective religious denominations. There was absolutely no evidence to the contrary in the draft board file and in no respect was petitioner's evidence or his claim for exemption impeached and discredited before the draft boards. The undisputed evidence, therefore, showed that the determination of the draft boards denying petitioner his claim for exemption as a minister of religion was arbitrary and capricious, being in violation of due process of law. [20-43]

* The facts in this paragraph are not taken from the opinion but from the record filed in this case.

How Issues Raised

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of all the evidence petitioner moved for a judgment of acquittal notwithstanding the verdict [49] on the grounds that the undisputed evidence showed the draft board order to be void. [49] Motion was denied, with exception to petitioner. [50, 51]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [45, 50] The requested charge was refused, with exception allowed. [45, 50].

The trial court instructed the jury that the only issue to be determined was whether or not petitioner having departed from the camp with permission to leave for one day, remained away continuously. The jury was instructed that if the evidence established such fact, petitioner would be guilty. [44-45]. The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [45] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [44-45]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose.

The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (Appendix)

On October 4, 1946, the court below said: "At the trials all of the proffered evidence to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal." [64]

Specifications of Error

The Circuit Court of Appeals for the Ninth Circuit erred—

(1) In holding that the ruling of the trial court to the effect that the illegality of the draft board proceedings was not material as a defense and that such ruling was harmless error because the draft board proceedings showed that the classification was not without basis in fact and was within the jurisdiction of the agency.

(2) In refusing to follow the decisions of this Court in *Estep v. United States*, 327 U.S. 114; *Smith v. United*

States, 327 U. S. 114; *Gibson v. United States*, 67 S. Ct. 301; *Dodez v. United States*, 67 S. Ct. 301.

(3) In holding that there was basis in fact for the classification given petitioner by the draft boards when the undisputed evidence showed that petitioner was exempt from training and service as a minister of religion under Section 5 (d) of the Act.

(4) In holding that *de novo* evidence could not be considered by the trial court in determining whether or not the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion under Section 5 (d) of the Act.

(5) In affirming the judgment of conviction.

Reasons Relied on for Granting the Writ

The decision of the court below is in direct conflict with the holdings of this Court in *Estep v. United States*, 327 U. S. 114; *Smith v. United States*, 327 U. S. 114; *Gibson v. United States*, 67 S. Ct. 301; and *Dodez v. United States*, 67 S. Ct. 301. The facts in this case are identical to the facts in the *Gibson* case in so far as the proceedings by the draft boards are concerned and the extent to which the registrant went in order to exhaust his administrative remedies. The difference between this case and the *Gibson* case is that in this case the court allowed all of the draft board file to go into evidence whereas in the *Gibson* case the draft board file was excluded, along with *de novo* evi-

dence. However, the facts in this case in respect to the rulings of the trial court are identical with the facts in the *Dodez* case. In the *Dodez* case, as in this case, the draft board file was received into evidence. Some *de novo* evidence and other proof with respect to the denial of due process of law by the draft board was excluded from evidence. In the *Dodez* case, as in this case, the petitioner urged that the undisputed evidence appearing in the draft board file established that the petitioner was exempt as a minister of religion from all training and service and, therefore, the prosecution should be dismissed. Inasmuch as the trial court in this case withheld from consideration in the trial court by the court or jury whether the draft boards exceeded their jurisdiction or denied petitioner's claim for exemption without basis in fact, a new trial should have been ordered by the court below as this Court directed in the *Estep*, *Smith*, *Gibson* and *Dodez* cases.

A proper opinion was expressed and a correct disposition of this case was made by the court below in its opinion of April 5, 1946. (Appendix)

Following the rendition of that decision, the Government, acting by and through an Assistant Attorney General and attorneys of the Department of Justice, filed a joint petition for rehearing in this and in the two companion

cases strongly urging to the court below that the judgment in this case should properly be affirmed because the undisputed evidence appearing from the draft board file showed that petitioner was not illegally classified by the draft boards and, therefore, the holding of the district court was harmless error. Accordingly, the court below was erroneously requested to set aside its judgment and affirm the judgment of the district court.

This was identically the same argument that the Government unsuccessfully made to this Court in the *Smith* case and again in its "Brief for the United States on Reargument" at pages 39-56 in *Gibson v. United States*, No. 23, October Term 1946.

On October 4, 1946, the court below accepted this specious and factitious argument of the Government and set aside its decision of April 5, 1946, withdrawing the same and ordered the judgment of conviction affirmed.

Thereupon petitioner filed his petition for rehearing, calling attention to the fact that the cases of *Gibson v. United States* and *Dodez v. United States* had been decided by this Court on December 23, 1946, in which it was held, on circumstances and facts identical to the facts in this case, that the judgments of conviction should be reversed and new trials ordered. See Appellants' Joint Petition for Rehearing filed in this case. [67]

In view of the extraordinarily deliberate and intentional departure from the decisions of this Court and the attempted *sub silentio* "overruling" of the decisions of this Court in the *Estep*, *Smith*, *Gibson* and *Dodez* cases, this Court should, simultaneously with the granting of the writ of certiorari, reverse the judgment of the court below and order the judgment of the district court reversed and remanded for a new trial. This should be ordered on the ground that the decision of the court below on April 5, 1946, is correct. It should be done also because the decision

of the court below on October 4, 1946, is not compatible with the decisions of this Court in *Estep v. United States*, *Smith v. United States*, *Gibson v. United States*, and *Dodez v. United States*.

This action should be taken on the authority of *United States v. Balogh*, 67 S. Ct. 625; rehearing denied 67 S. Ct. 633. See also *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715; rehearing denied 320 U. S. 816.

The petition for writ of certiorari also should be granted because the decision of the court below is directly in conflict with the decision of the Fourth Circuit Court of Appeals in *Poole v. United States*, decided January 28, 1947, — F. 2d —.

In holding that there was basis in fact for the classification given petitioner, the court below has passed upon an important question of federal law which has not been, but which should be decided by this Court. There is substance and merit to petitioner's contention that he was exempt as a minister of religion and that there was no basis in fact for the classification given him by the draft boards in this case. See the extensive argument upon this question at pages 83-131 in Joint Brief for Respondent Kulick and Petitioner Sunal in No. 840, October Term 1946, *Alexander v. United States ex rel. Kulick*; and No. 535, October Term 1946, *Sunal v. Large*.

The ruling of the court below that *de novo* evidence was not receivable in the trial court for the purpose of determining whether or not the draft boards exceeded their jurisdiction in ordering petitioner, who was, as a minister of religion, exempt from training and service, to report to the civilian public service camp in question, is a decision upon an important question of federal law which has not been, but which should be, decided by this Court.

Moreover, the question is analogous to that decided by this Court in *Kessler v. Strecker*, 307 U. S. 22, 34-35; *Chin Yow v. United States*, 208 U. S. 8, 13. To the extent that this particular question here presented as to whether *de novo* evidence should have been received is analogous to that involved in the cases just cited, the decision of the court below is a departure from and in conflict with applicable decisions of this Court. For this reason also the petition for writ of certiorari should be granted.

Conclusion

For the reasons stated, petitioner submits that the writ of certiorari prayed for herein should be granted. He further prays that, in the circumstances of this case, it would be appropriate for this Court to reverse the judgment below and order the judgment of the trial court reversed and the cause remanded for a new trial without further briefs or argument.

Respectfully submitted,

WILBUR ROISUM
Petitioner

HAYDEN C. COVINGTON
Counsel for Petitioner

Appendix**UNITED STATES CIRCUIT COURT OF APPEALS****NINTH CIRCUIT****No. 10,917****Wesley William Cox, *Appellant*****v.****United States of America, *Appellee*****No. 10,928****Theodore Romaine Thompson, *Appellant*****v.****United States of America, *Appellee*****Upon Appeal from the District Court of the United States
for the District of Idaho****No. 10,942****Wilbur Roisum, *Appellant*****v.****United States of America, *Appellee*****Upon Appeal from the District Court of the United States
for the District of Oregon****April 5, 1946****Before: STEPHENS, HEALY and BONE, Circuit Judges:****STEPHENS, Circuit Judge.****Wesley William Cox and Theodore Romaine Thompson
were indicted by a United States Grand Jury in the District**

of Idaho, Eastern Division, under the Selective Training and Service Act of 1940 as amended, 50 U. S. C. A. App. § 311. Wilbur Roisum was indicted by a United States Grand Jury in the District of Oregon under the same statute. Each of the indictees was tried, convicted and sentenced, and each has appealed to this court from the judgment and sentence. The three appeals are submitted to us for decision upon a consolidated brief and oral argument for appellants and upon separate briefs for appellee.

Each appellant, a registrant under § 302, was classified (§ 310) as a conscientious objector [§ 305 (g)], and was ordered to a civilian camp, there to perform such work of national importance (§ 309 a) as he should be directed to perform. After various happenings, which we need not here relate, each registrant proceeded to camp. Within fifteen or twenty minutes after arriving, Cox and Thompson left without permission and intentionally remained away. After Roisum arrived at camp, he was given a limited leave of absence and intentionally remained away after his leave had expired.

All requirements to reception in camp as selectees had been met. Unlike acceptance into the armed forces, which entails a ceremony of induction, whereby the registrant ceases to be a civilian, a conscientious objector undergoes no change in his status as a civilian by becoming a selectee in a camp.

Each appellant claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained Jehovah's Witness minister of religion exempted him from any training or service under the Act and from the jurisdiction of a board to issue any order directed to him.

It will be seen that § 305 (d) acts to exempt "regular and duly ordained ministers of religion" from training or

service but not from registration. The claim mentioned was at all times consistently, persistently and openly made by each registrant. It was the subject of competent proof to the boards through the registrant's questionnaires, and evidence was presented at board hearings that, although the registrants were conscientiously opposed to war by reason of religious training and belief, they were ministers, and requests were made for classification as such. Notwithstanding all of this, say the appellants here, the boards treated their claims as ministers, arbitrarily and capriciously, and proceeded to classify them as conscientious objectors.

At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals.

After oral argument this court was informed that the Supreme Court of the United States would soon decide two cases, which, it was thought, would control the cases here under consideration. The cases referred to, *Estep v. United States* (No. 292) and *Smith v. United States* (No. 66), 327 U. S. 144, were treated together and decided on February 4, 1946, in a majority, consolidated opinion.

In the case of *Estep v. United States*, the registrant sought in the trial court to defend against a charge that he had wilfully refused to submit to induction into the Navy on the ground that he was an ordained Jehovah's Witness minister of religion and that he had been improperly denied exemption from service by the classifying agencies in arbitrarily and capriciously refusing to fix his classification as IV-D [minister of religion, § 305 (d)]. (Another ground was presented which we need not consider.) This defense was rejected.

It will be seen that the *Estep* case parallels the instant cases, with the difference that *Estep* was directed to be inducted into one of the armed forces, whereas the three registrants here were directed to go to, and remain in, conscientious objector's camp. In each case (the *Estep* and our cases) the registrant proceeded to the place to which he was ordered. *Estep* went to the place of induction, where he refused to obey the board's order to submit to induction and, therefore, retained his civilian status. Each registrant in our cases went to camp, retaining his civilian status, but each refused to continue performance of board orders. On the face of these facts each registrant remained a civilian and as such appeared to have committed an offense against the United States under § 311.

In the *Estep* and *Smith* opinion it is said that the Supreme Court in *Falbo v. United States*, 320 U. S. 549 (1944), held that a registrant could not defend in a criminal case under § 311 "on the ground that he was wrongly classified and was entitled to a statutory exemption for failure to report for induction into the armed forces or for work of national importance," and that it was therein further held that there is no judicial review of a registrant's classification short of his acceptance for service. All administrative steps must first be taken.

The question posed in the *Estep* case was: Is there a judicial review of a classification in a prosecution under § 311, where the registrant reported, was accepted, but refused to submit to induction? The difference between the *Estep* case and our cases does not distinguish them in principle.

There has been considerable doubt entertained by the courts as to whether or not submission to induction is an administrative step, necessary to be taken before any judicial process can be put to the aid of the registrant under a board's order, but this doubt has been put at rest. Sec-

tion 311 makes a wilful failure to perform any duty required of a registrant by the Act, the rules or regulations, an offense. And it is said in *Billings v. Truesdell*, 321 U. S. 542 (1944), that an order to report for induction is such a duty, and it includes the duty to submit to induction. The *Estep* and *Smith* opinion holds that "Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." (Emphasis ours.)

It is also held in the *Estep* and *Smith* opinion that the board's authority to hear and determine all questions of deferment or exemption is limited to action within its jurisdiction [§310 (a) (2)], but if outside the board's jurisdiction, its decision would not be final [citing *Tung v. United States*, 142 Fed. 2d 919 (CCA-1, 1944)]. Again, "If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service because he was a Jew, or a German, or a Negro, it would act in defiance of law." And, "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." In all such cases its action would be lawless and beyond its jurisdiction.

Thus, if a registrant who was an exempt minister, and who was ordered to report to an induction center for induction, or to a camp, there to remain and perform work of national importance, obeyed the order by proceeding to the designated place, but disobeyed it by refusing induction or by refusing to remain in camp, he could defend against a charge under § 311 with proof of his exempt status.

In referring to § 310 (a) (2), which provides that the board's orders are final, the Supreme Court says in the *Estep* and *Smith* opinion: "It means that the courts are

not to weigh the evidence to determine whether the classification made by the local boards was justified." It is obvious that this comment is directed to classifications within the board's jurisdiction.

The *Estep* and *Smith* opinion concludes with the statement: "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried.

Reversed and remanded

(Endorsed:)

Opinion. Filed April 5, 1946. Paul P. O'Brien, Clerk.

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CHARLES E. KELLEY

SUPREME COURT OF THE UNITED STATES

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JOINT BRIEF FOR PETITIONERS

HAYDEN C. COVINGTON

Counsel

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SUPREME COURT OF THE UNITED STATES

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No. 66

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ON CERTIORARI TO
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FOR THE NINTH CIRCUIT

JOINT BRIEF FOR PETITIONERS

Joint Statement

Jurisdiction

This Court has jurisdiction of these cases under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court, May 7, 1934.

Judgments of affirmance were rendered and entered October 4, 1946. (Cox [61-62], Thompson [64-65], Roisum [66-74])¹ The time for filing petition for rehearing was enlarged. (Cox [73], Thompson [65], Roisum [67]) Petition for rehearing was duly filed within the time fixed by the order extending the time. (Cox [63-72], Thompson [65], Roisum [67]) The petition for rehearing was denied March 20, 1947. (Cox [73], Thompson [65], Roisum [67]) The petitions for writs of certiorari were filed April 7, 1947, and the writs were granted June 9, 1947. (Cox [75], Thompson [67], Roisum [69]) (67 S. Ct. 1532)

Opinion Below

The opinion of the United States Circuit Court of Appeals reversing the judgments in these cases on April 5, 1946, is not reported. The opinion does not appear in the records, but appears as Appendix to the petitions for writs of certiorari in each of these cases. The opinion was withdrawn by an order of the court dated September 27, 1946. (Cox [54], Thompson [57-58], Roisum [59-60])

The opinion of the court below affirming the judgments of conviction is reported at 157 F. 2d 787. It appears in the record. (Cox [56-61], Thompson [59-64], Roisum [62-66])

¹ Bracketed figures appearing herein refer to pages of printed transcript of records.

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. ¶ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 626.1, 627.12, 627.24, 627.25, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.1-651.10, 652.1, 652.2, 652.11, 652.12, 652.13, 653.1, 653.2, 653.3, 653.11, 653.12, of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Questions Presented

ONE

Did the court below err in holding that the judgments of conviction should be affirmed because the denial of each petitioner's right to be heard on his attack against the validity of the draft board proceedings was immaterial and harmless error in that there was basis in fact for the classification given by the draft boards?

TWO

Did the court below err in failing to hold that the undisputed evidence in these cases showed that the denial of each petitioner's claim for exemption from training and service as a minister of religion was without basis in fact and in excess of the jurisdiction of the draft boards?

THREE

Did the court below err in holding that the trial courts could not consider *de novo* evidence in determining whether the draft boards exceeded their jurisdiction in denying each petitioner's claim for exemption as a minister of religion?

Facts Common to All Cases

The facts here stated are taken from the opinion of the court below. These facts were stated by the court below as covering jointly these three cases. Therefore, for an abbreviated presentation of the facts found by the court below the petitioners here adopt the statement of facts appearing in the opinion of the court below.

Each petitioner was classified as a conscientious objector and ordered to a civilian public service camp, there to perform such work of national importance as he should be directed to perform. He reported. Within fifteen or twenty minutes after arriving Cox and Thompson left without permission and intentionally remained away. Petitioner Roisum, after arriving, was given a limited leave of absence and remained away, after his leave had expired. (Cox [57-58], Thompson [60-61], Roisum [62-63]).

Each petitioner claimed that he had obeyed all administrative orders directed to him and that he was under no lawful restraint whatever, as he saw it, since his claimed status as a duly ordained minister of religion exempted him from any training and service under the Act and from the jurisdiction of a board to issue any order directed to him. Section 5 (d) of the Act (50 U.S.C. App. 305 (d)) acts to exempt "regular and duly ordained ministers of religion" from training and service but not from registration. (Cox [58-59], Thompson [61-62], Roisum [63])

Petitioners' claims as to exemption were at all times consistently, persistently and openly made by each. These claims were the subject of competent proof to the boards through each petitioner's questionnaire, and evidence was presented at board hearings that, although he was conscientiously opposed to war by reason of religious training and belief, he was a minister, and requests were made for classification as such. Notwithstanding all of this, each petitioner says that the boards treated his claim as a min-

ister arbitrarily and capriciously, and proceeded to classify him as a conscientious objector. (Cox [58-59], Thompson [62], Roisum [64])

At the trial all of the proffered evidence relevant to petitioners' claimed status as ministers of religion was received by the court, but the jury was instructed in each case not to consider it for any purpose. The evidence presented was competent and substantial. The appropriate steps were taken entitling each petitioner to maintain appeals. (Cox [69], Thompson [62], Roisum [64])

Separate Statement of Cox Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on May 26, 1944, being an assignee of a civilian public service camp located at Downey, Idaho, petitioner unlawfully did desert, leave and depart from said camp. [2-3] Petitioner pleaded "not guilty". [3] He was tried to a jury before the court on October 24, 1944. [5-28] At the close of the Government's case petitioner moved for a directed verdict. [19] The motion was denied with exception. [19] At the close of all the evidence, petitioner renewed his motion for directed verdict. [39-40] The case was argued to the jury. [20] The court instructed the jury. [24-28] Petitioner duly submitted requested instruction to the court, which was denied with exception. [40] The jury retired and returned its verdict of guilty. [4, 28] By judgment petitioner was committed to the custody of the Attorney General for a period of three years and three months and fined \$300.00. [4-5] Petitioner duly served and filed his notice of appeal. [28-30]

He was admitted to bail pending appeal. [30-35] He timely filed his assignments of error. [35-37] Bill of exceptions, preserving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [38-43] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being later affirmed.

FACTS

Petitioner's selective service file shows that he registered under the Selective Training and Service Act on October 16, 1940, with Local Board No. 2, Jackson County, Oregon. [8] He filed his questionnaire (Pl. Ex. No. 2) [9] on December 3, 1940. [2] He stated that he was 22 years old; that since 1936 he had been employed as a truck driver hauling lumber; and that he was engaged in no other business or work.

On December 4, 1940, the local board classified petitioner in Class I, subject to physical examination, and on January 31, 1941, he was classified IV-F—not physically fit for service. The classification was changed to I-A on March 10, 1942. Ten days later, on March 20, 1942, petitioner for the first time claimed exemption from military service. He filed the form provided for registrants asserting conscientious objections to military service. (Pl. Ex. No. 3). [9]

In this document petitioner stated that he became one of Jehovah's witnesses in January, 1942, and began wit-

nessing from house to house and on street corners; that his occupation was "logging and lumbering".

The local board rejected petitioner's claim to exemption, but on May 25, 1942, he was again classified in IV-F, as one physically unfit for military service. On June 12, 1942, the local board reclassified petitioner in IV-E, as a conscientious objector to military service. In response to this classification, petitioner wrote the local board on June 22, 1942, requesting for the first time that he be classified as a minister of religion. [12] On June 26, 1942, the local board determined that petitioner was properly classified IV-E. On the same date petitioner took an appeal to his board of appeal and on December 7, 1942, the board of appeal also classified him in IV-E.

Petitioner informed the board that on October 16, 1942, he became a "pioneer" minister and undertook to devote 150 hours monthly to his preaching work. An affidavit from another minister was filed stating that petitioner had been associated with Jehovah's witnesses since January, 1942, and that he was serving as a minister. He also filed a statement from the Watchtower Bible and Tract Society to the same effect. [12-15]

Petitioner requested the local board to reconsider the classification, but on December 21, 1942, the board refused to do so. On May 18, 1944, the local board ordered petitioner to report for work of national importance. He reported [10] to the civilian public service camp to which he was assigned "solely for the purpose of completing the administrative process" [18] and he then left the camp. [22]

HOW ISSUES RAISED

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of the Government's case [19] and again at the close of all the evidence [39-40] petitioner moved for an instructed verdict and for a judgment of acquittal, on the grounds that the undisputed evidence showed the draft board order to be void. [19, 39-40] Each motion was denied with exception to petitioner. [19, 39-40, 43]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [40] The requested charge was refused, with exception allowed. [40]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner departed and deserted from the camp without proper authority to do so. The jury was instructed that if the evidence established that petitioner left the camp without such authority he would be guilty. [27] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [27] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [26-27] The trial court specifically instructed the jury as follows:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he

was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

"If you find that the Government has proved these allegations then you will find the defendant guilty as charged, otherwise you will acquit him.

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant.

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho." [26-27, 40-41]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a

valid defense to the charges for which they were being tried." (See Appendix to petition filed with this Court.)

On October 4, 1946, the court below said: "At the trials all of the proffered evidence to each registrant's claimed status as a minister was received by the courts, and as to each instance it was determined that there was substantial evidence before the boards upon which they based their classification. In each instance the court instructed the jury that they were not to consider such evidence for any purpose whatever. The evidence presented as to the showing to the boards was competent and substantial. In each case the appropriate steps were taken entitling the registrant to maintain his appeal." [59]

Separate Statement of Thompson Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on April 18, 1944, being an assignee of a civilian public service camp located at Downey, Idaho, petitioner unlawfully did desert, leave and depart from said camp. [2-3] Petitioner pleaded "not guilty". [3] He was tried to a jury before the court on October 24, 1944. [6-33] At the close of the Government's case petitioner moved for a directed verdict. [23] The motion was denied with exception. [24] At the close of all the evidence, petitioner renewed his motion for directed verdict. [28-29] The case was argued to the jury. [28] The court instructed the jury. [29-33] Petitioner duly submitted requested instruction to the court, which was denied with exception. [32-33, 45] The jury retired and returned its verdict of guilty. [4, 33] By judgment petitioner was

committed to the custody of the Attorney General for a period of three years and three months and fined \$300.00.

[4-5] Petitioner duly served and filed his notice of appeal.

[33-34] He was admitted to bail pending appeal. [35-40]

He timely filed his assignments of error. [40-42] Bill of

exceptions, preserving the questions presented upon appeal

and upon this petition for writ of certiorari, was duly and

timely allowed by the trial court. [42-48] In due course the

case was, in the court below, argued, submitted, reversed

and resubmitted upon the Government's motion for rehear-

ing, resulting in the judgment being first reversed and

later affirmed.

FACTS

On October 16, 1940, petitioner registered with Local

Board No. 1, Jackson County, Oregon (Pl. Ex. No. 1). [9]

In his selective service questionnaire (Pl. Ex. No. 2) [10]

which was executed May 27, 1941, petitioner stated that

he was operating a grocery store and that, in addition, he

was and had been a minister of Jehovah's witnesses since

August 1, 1940. In the conscientious objector's form (Pl.

Ex. No. 3) [10] which he filed at the same time, petitioner

stated that he became associated with Jehovah's witnesses

in August 1940; that after completing high school in 1928

he worked as a grocery clerk and manager until 1935, as

an embalmer in 1935, and as a grocery manager and owner

thereafter.

On May 28, 1941, the local board classified petitioner in III-A, a deferred classification because of dependents. When the dependency deferment was no longer available to persons in petitioner's situation he was classified as IV-E, as a conscientious objector to military service.

On November 5, 1943, petitioner appealed to the board of appeal and he adduced additional evidence in support of his claim to exemption. He filed a statement signed by various persons stating that they recognized him as a minister, and an affidavit by Fred Kimmet, minister of Jehovah's witnesses, stating that petitioner's record of "field service" for the year ending September 30, 1943, showed that petitioner devoted 519½ hours in his ministerial work during which time he disposed of 46 bound books, 625 booklets and 673 magazines, and made 105 "back calls" upon persons manifesting interest in the Bible. Similar supporting documents corroborating petitioner's claim were also filed.

On December 29, 1943, the board of appeal by vote of 5 to 0 classified petitioner in IV-E. An order to report for work of national importance was sent to petitioner (Pl. Ex. No. 5) [11] and he complied with it by reporting to the civilian public service camp to which he was assigned. After reporting to the camp, petitioner promptly handed to the camp director a letter stating that he believed himself to be wrongly classified and that he would not remain at the camp [21-22]. Within fifteen or twenty minutes after reporting petitioner left the camp and did not return [27].

HOW ISSUES RAISED

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of the Government's case [23] and again at the close of all the evidence [28-29] petitioner moved for an instructed verdict and for a judgment of acquittal, on the grounds that the undisputed evidence showed the draft board order to be void. [23, 28-29] Each motion was denied with exception to petitioner. [24, 28-29]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [32, 33, 45] The requested charge was refused, with exception allowed. [32, 33, 45]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner departed and deserted from the camp without proper authority to do so. The jury was instructed that if the evidence established that petitioner left the camp without such authority he would be guilty. [31-32] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [31-32] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [31-32] The trial court specifically instructed the jury as follows:

"The Government must prove the material allegations of the indictment, that the defendant was duly registered by a local board under the Selective Service and Training Act of 1940 and that he was thereafter classified and that he was ordered to report and that he did thereafter leave and desert the Civilian Public Service Camp to which he was assigned as set out in the indictment, which has been read to you and which you may take to the jury room.

"If you find that the Government has proved these allegations then you will find the defendant guilty as charged, otherwise you will acquit him."

"You are not to concern yourselves with the action of any Selective Service Board, nor are you concerned in whether or not they acted properly in making their orders. This evidence was submitted to show the opportunity afforded the defendant to present proof of any classification he might claim. It is not your province to review the action of the draft board in its determination and classification of the defendant."

"In this matter you should concern yourselves only with the question of the guilt or innocence of the defendant as to the offense charged in the indictment, that is, that he did without proper authority so to do, leave, desert and depart from Civilian Public Service Camp No. 67, at Downey, Idaho." [31-32, 45-46]

That the issues properly raised the questions presented upon appeal to the court below and that the questions presented upon this petition for writ of certiorari were properly raised in the trial court, is recognized and declared by the court below in its opinions of April 5, 1946, and October 4, 1946. On April 5, 1946, it said: "At the trials all of the proffered evidence relevant to each registrant's claimed status as a minister was received by the court, but the jury was instructed not to consider it for any purpose. The evidence presented was competent and substantial. In each case the appropriate steps were taken entitling the registrants to maintain appeals. . . .

"It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (See Appendix to the petition filed with this Court.)

Separate Statement of *Roisum* Case**FORM OF ACTION**

This criminal action was instituted in the District Court of the United States for the District of Idaho by return of an indictment. In it petitioner was charged with violating the Selective Training and Service Act of 1940, as amended. [2] The indictment charges that on May 27, 1944, being an assignee of a civilian public service camp located at Lapine, Oregon, petitioner, after being given a limited leave of absence unlawfully did fail and refuse to return to said camp. [2-3] Petitioner pleaded "not guilty". [4] He was tried to a jury before the court on October 24, 1944. [20-50] The court instructed the jury. [44-45, 47] Petitioner duly submitted requested instruction to the court, which was denied with exception. [45, 50] The jury retired and returned its verdict of guilty. [48-49] Petitioner thereupon filed his motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. [49] Said motion was denied. [51] By judgment petitioner was committed to the custody of the Attorney General for a period of two years. [5-6, 51] Petitioner duly served and filed his notice of appeal. [7-8] He timely filed his assignments of error. [8-9] Bill of exceptions, preserving the questions presented upon appeal and upon this petition for writ of certiorari, was duly and timely allowed by the trial court. [10-16] In due course the case was, in the court below, argued, submitted, reversed and resubmitted upon the Government's motion for rehearing, resulting in the judgment being first reversed and later affirmed.

FACTS

Petitioner registered under the Selective Training and Service Act with Local Board No. 1, Sunnyside, Washington, and in December, 1941, he filed his selective service questionnaire. In that document he stated that he was twenty-two years old; that he had an eighth grade education; that for the past fifteen years he worked as a farmer; that he was ordained as a minister of Jehovah's witnesses in June, 1940; and that he desired classification in IV-D as a minister of religion.

Petitioner also filed a form letter from the Watchtower Bible and Tract Society which stated, *inter alia*, that he had been associated with it since 1936; that he had been baptized in 1940; and that he devoted his "entire time" to his ministerial work. He also submitted an affidavit dated December 15, 1941, signed by his father which stated that petitioner was necessary to the operation of the father's farm.

He filed a conscientious objector's form on June 29, 1942, in which he claimed exemption from combatant and noncombatant military service. In this document he affirmed again that for the past fifteen years he had worked as a farmer. He stated also that he became associated with Jehovah's witnesses in 1930.

Kenneth Hazen, minister in possession of the local records, informed the Selective Service System that the records of petitioner's ministerial activities showed that he worked the following number of hours in the months specified:

Month	Year	Hours
October	1942	28
November	1942	11
December	1942	47
January	1943	60
February	1943	69
March	1943	21 ²

Hazen informed the board that "to my knowledge Wilbur Roisum has also conducted up to five studies a month, necessitating twenty calls a month." According to Hazen, petitioner held office in the local company of Jehovah's witnesses as "Assistant Company Servant", "Back Call Servant" and "Book Study Conductor".

On June 25, 1942, the local board classified petitioner in I-A-O, as a conscientious objector to combatant military service. Petitioner immediately appealed to his board of appeal. A hearing was held before a Department of Justice Hearing Officer, who filed a report recommending that petitioner's claim to exemption as a conscientious objector be sustained. Thereafter, on August 4, 1943, the board of appeal classified petitioner in IV-E, as a conscientious objector to all military service. Petitioner's subsequent request to the State Director that an appeal be taken to the President was rejected.

Petitioner, having been found physically acceptable for service, was ordered to report on May 23, 1944, to the local board for work of national importance. He reported and was transported to a civilian public service camp where he remained for five days. At his request, he was granted a week-end pass to leave camp and he never returned. [35]

² Hazen informed the board that petitioner had suffered a leg injury in this month, the inference being that this accounts for the low number of hours worked.

HOW ISSUES RAISED

The trial court erroneously excluded from evidence, on objection from the Government, with exception to petitioner, testimony offered *de novo* to establish the background training and bona fide activity of petitioner as a minister of the gospel.

At the close of all the evidence petitioner moved for a judgment of acquittal notwithstanding the verdict [49] on the grounds that the undisputed evidence showed the draft board order to be void. [49] Motion was denied, with exception to petitioner. [50, 51]

Petitioner duly tendered to the court his requested charge properly raising the issue of the validity of the draft board determination. [45, 50] The requested charge was refused, with exception allowed. [45, 50]

The trial court instructed the jury that the only issue to be determined was whether or not petitioner having departed from the camp with permission to leave for one day, remained away continuously. The jury was instructed that if the evidence established such fact, petitioner would be guilty. [44-45] The trial court instructed the jury that the issue of the legality of the draft board proceedings and determination was not before them for consideration. [45] In thus instructing the jury, the trial court held that the draft board proceedings were not subject to attack by petitioner against the indictment. [44-45]

On motion for judgment of acquittal notwithstanding the verdict of the jury or in the alternative for a new trial, petitioner asserted the claim that his classification was the result of "arbitrary, capricious and unlawful conduct" by the classifying board. [12-13] At this juncture, the trial judge examined petitioner's selective service file which was in evidence, and thereafter the motion was denied because the court concluded that the classification was not in issue, material or unlawful. [51]

Specification of Errors

The Circuit Court of Appeals for the Ninth Circuit erred—

ONE

In holding that the ruling of each trial court to the effect that the illegality of the draft board proceedings was not material as a defense and that such ruling was harmless error because the draft board proceedings showed that the classification was not without basis in fact and was within the jurisdiction of the agency.

TWO

In refusing to follow the decisions of this Court in *Estep v. United States*, 327 U.S. 114; *Smith v. United States*, 327 U.S. 114; *Gibson v. United States*, 329 U.S. 338; *Dodez v. United States*, 329 U.S. 338.

THREE

In holding that there was basis in fact for the classification given petitioners by the draft boards when the undisputed evidence showed each petitioner was exempt from training and service as a minister of religion under Section 5 (d) of the Act.

FOUR

In holding that *de novo* evidence could not be considered by each trial court in determining whether or not the draft boards exceeded their jurisdiction in denying petitioner's claim for exemption as a minister of religion under Section 5 (d) of the Act.

FIVE

In affirming the judgments of conviction.

POINTS FOR ARGUMENT

ONE

The conceded errors of the trial courts in their instructions and rulings that the illegality of the draft board proceedings in these cases could not be considered in petitioners' defenses may not be cured by a holding of the circuit court of appeals upon a *de novo* consideration of the draft board records that the orders to report were legal.

TWO

There was no basis in fact for the classifications given petitioners by their draft boards because the undisputed evidence showed that they were exempt from training and service as ministers of religion under Section 5 (d) of the Selective Training and Service Act of 1940.

THREE

De novo evidence as to the exempt status of petitioners should have been received and considered by the trial courts in determining whether the draft board orders were in excess of the jurisdiction of the local boards because petitioners were exempt as ministers of religion under Section 5 (d) of the Selective Training and Service Act.

ARGUMENT ONE

The conceded errors of the trial courts in their instructions and rulings that the illegality of the draft board proceedings in these cases could not be considered in petitioners' defenses may not be cured by a holding of the circuit court of appeals upon a *de novo* consideration of the draft board records that the orders to report were legal.

The court below held that the judgments should be affirmed because, upon the evidence, it appeared that petitioners were not illegally classified and denied their claims as ministers of religion within the meaning of the Act and therefore the district courts did not commit any prejudicial error against petitioners when the evidence appearing in the draft board files was excluded from consideration by the courts and juries, or when the courts instructed the juries that they could not consider the alleged illegality of the draft boards' determinations. In other words, the court below held that the alleged error in denying petitioners due process of law was harmless because petitioners would not have been able to establish that the draft boards acted illegally, even if the district courts had ruled properly.

This holding begs the question. It puts the cart before the horse. If there was denial of due process of law such denial cannot be cured by the finding of the court below that petitioners were allowed due process of law by the draft boards. Suppose the district courts had denied petitioners the right to counsel. Can it be reasonably said that such denial could be cured by a finding that petitioners had no good defense to the indictments because their draft boards' files showed they were legally classified and therefore guilty of failing to remain at the civilian public service camps? Suppose the district courts would have put them to trial upon

information rather than indictment. Suppose the courts erroneously overruled a plea of former jeopardy. Suppose petitioners were convicted upon confessions illegally obtained, contrary to the Constitution. Can it reasonably be said in any of these instances that the violation of the Constitution is harmless error because the draft boards' files showed petitioners were legally classified and that they were guilty?

The mere asking of the questions answers with a resounding, No!

The final judgments of the court below in all of these cases should be reversed and the causes remanded with directions for a new trial of each of the indictments so that the judgments will conform to and comply with the decisions of this Court in *Estep v. United States*, 327 U.S. 114, *Smith v. United States*, 327 U.S. 114, *Gibson v. United States*, 329 U.S. 338, and *Dodez v. United States*, 329 U.S. 338.

In each of these cases just mentioned the facts and circumstances were identical to the facts and circumstances here. The erroneous ruling in each of said cases by the trial court was held by this Court to require a reversal and an order remanding each case to the trial courts for further proceedings.

In its opinion in *Dodez v. United States* (329 U.S. 338) this Court said:

"This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists, however, that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced, would support no other verdict than one of acquittal and that therefore the trial court should have sustained his motion to dismiss the cause. Accordingly he asks for a judgment here directing that such relief be given.

"In the *Estep* and *Smith* cases [327 U.S. 114], after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: 'We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.' 327 U.S. at 125. *Dodez*' situation is identical, in this respect, with those of *Estep* and *Smith*. Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues."

In the *Gibson* case, the Government argued, as its ground for affirmance in that case, the same ground that was urged by the court below in its opinion: "Since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely." (Cox [60], Thompson [62-63], Roisum [64-65])

In the brief for the United States on reargument in *Gibson v. United States*, No. 23, October Term 1946, the Government, *inter alia*, stated: "Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed on the ground that the information contained in petitioner's selective service file, which he offered in evidence, plainly shows that there was foundation in the facts before the boards for rejecting petitioner's claim to classification as a minister. . . . we think there was ample basis in fact for the boards' rejection of peti-

tioner's claim." (See pages 7-8; 39-56 of Government's brief.)

The opinion of the court below holding that the action of the trial courts, in refusing to consider or to permit the juries to consider the illegality of the administrative action is harmless error, should not stand. A similar attempt was made by the Fourth Circuit Court of Appeals in *Smith v. United States*, 148 F. 2d 288. See the last point discussed in that opinion. The *Smith* case was a companion case to the *Estep* case (327 U.S. 114) in this Court. The Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. This Court did not consider the error harmless, as did the court below, in its affirmance of the judgments here. In the *Smith* case the trial court refused to permit the jury to pass upon the issues raised. In the *Smith* case the trial court limited determination of the issues to whether the defendant complied with the order. In these cases the district courts limited the determination to whether the petitioners complied with the orders to remain at the camps. Moreover, in the *Smith* case, as well as in these cases, the trial court did not pass upon the legality of the administrative determination.

If the court below can pass upon the validity of the administrative determinations after reviewing the draft board files, then the district courts should have done so. Inasmuch as the district courts failed to consider the legality of the administrative determinations, and failed to permit the juries to determine the legality of the administrative actions, the errors, which are denial of due process, cannot be cured by the rationalizing of the court below in these cases. In the same way, the error in the *Smith* case could not be cured by the rationalizing of the court of appeals. *Smith v. United States*, 148 F. 2d 288; see last paragraph of opinion. The contrary view taken by this Court is best expressed by the last sentence of its opinion in the *Estep* and

Smith cases (327 U.S. 114): "Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."

If this Court was of the opinion that the performance of secular work by a minister of religion, or the failure of a minister to devote his full time (to the exclusion of all other activity) in the furtherance of ministerial work, would be ground for holding as harmless error the action of the trial court in excluding evidence and in holding that the jury could not consider the alleged illegality of the draft board action it would have so held in the *Smith* case. It seems plain that if one is denied the right to make his defense that the action of the draft boards was illegal, such cannot be held harmless error because the appellate court is of the opinion that the draft boards did not err in making the classifications. If such can be accomplished, then the denial of the right of trial by jury can be held to be harmless error on the ground that the undisputed evidence shows that the defendant is guilty. The effort of the court below to hold as harmless error the denial of due process by the district courts is an effort to use appeal as a trial *de novo* of the guilt or innocence of petitioners.

Only one court has jurisdiction to determine the guilt or innocence of petitioners under the indictments, and that is the district court in each case. The failure of the district courts to exercise judicial function did not authorize the circuit court of appeals to reconsider the evidence *de novo* to determine whether or not petitioners were guilty. The district courts having failed to exercise their function in this regard cannot be exonerated from the violations of the Constitution because the court of appeals saw fit to allow petitioners a full and fair trial on the alleged illegality of the administrative determination after their convictions. They were entitled to this consideration before conviction.

The holding of the court below that, although the de-

fense was available, the petitioners' convictions should be affirmed because the draft board proceedings in each case were found to be valid, is an extraordinary departure from due process of law in appeal of criminal cases. The judgments of conviction are invalid because of the denial of the right to be heard in the district courts on the validity of the draft boards' determinations. The denial of this right entitled petitioners to reversals and new trials. The invalidity of the judgments because of the denial of the right, cannot be validated by the court's inquiring into the validity of the draft board proceedings in each case. Once the judgments are invalid the validity cannot be restored by the court's performing the judicial functions that the district courts refused to perform.

The defense of whether or not petitioners were ministers of religion should have been submitted to the jury for determination. In a criminal prosecution it is beyond the power of the district court or the circuit court of appeals to hold that a defendant does not have a right to have the issue of his guilt submitted to the jury. If the undisputed evidence did not show that he was not guilty, then there was an issue for the jury as to guilt. The failure of the trial court and of the circuit court of appeals to hold that petitioners were entitled to have this issue submitted to the jury violated their constitutional right of trial by jury. *United States v. Taylor*, 11 F. 470, 471; *Cain v. United States*, 19 F. 2d 472; *Blair v. United States*, 241 F. 217, cert. denied 244 U.S. 655; *United States v. Stevenson*, 215 U.S. 190, 199; *Patton v. United States*, 281 U.S. 276.

The secular work of the petitioners, while regularly pursuing ministerial activities, does not, as a matter of law withdraw from the consideration of the jury whether or not they were exempt as ministers of religion. "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."—*Trainin v. Cain* (CCA-2) 144 F. 2d 944. See also *Ex parte Stewart* (DC-Calif.) 47 F. Supp. 415, 420.

In the case of *Smith v. United States* (CCA-4) 157 F. 2d 176, and also in the case of *United States v. Zieber* (CCA-3) 160 F. 2d 90, the courts held that whether there was a violation of procedural due process was a question of fact rather than one of law.

In *Ex parte Cain*, 39 Ala. 440-441, *Offord v. Hiscock*, 86 L. J. K. B. 941, and *Bien v. Cooke* (1944) 1 W. W. R. 237, each of the persons claiming exemption from military training and service was employed in secular work during the week and preached once a week as a minister of religion on Sundays. Each of those decisions held that particular determinations by the administrative tribunals were arbitrary, capricious and illegal because denying the claim for exemption on the ground that they were engaged in secular work. Regardless of whether this Court holds as a matter of law that one is a minister who performs secular work during the week engages in ministerial work regularly on Sundays and at other times during each week, the Court cannot hold as a matter of law in the face of these decisions

and the liberal interpretation placed upon the Act that one who does perform secular work to sustain himself in the ministry is not a minister of religion within the meaning of the Act. This being true, it is an issue for the jury or at least for the trial court. The trial courts did not perform their judicial function on the question. The petitioners did not have judicial trials before the trial judges on the issue of whether or not they were exempt. Indeed the trial courts excluded all the evidence and refused to pass on the question. It is improper for an appellate court to approve such illegal procedure on the part of the trial court because the appellate court is of the opinion that the draft board was not arbitrary and capricious in making its determination. It was the duty of the trial courts to first pass on this question in order that it could be properly reviewed in the appellate court. Not having been passed on either by the trial courts or the juries it is fundamental and reversible error to withhold the issue from the jury regardless of what the circuit court of appeals thought about the matter of the merit of petitioners' claim for exemption.

Since petitioners were denied due process of law, as they claim, then there is only one method whereby that denial can be cured. That is to remand their cases to the trial courts for new trials, so that upon retrials they will have opportunity to make their defenses. If one is denied the right of counsel, the right of trial by jury, or the right to trial under indictment contrary to the Constitution, such errors cannot be cured on the ground that they were harmless errors or that the petitioners are admittedly guilty, as the court below held here.

TWO

There was no basis in fact for the classifications given petitioners by their draft boards because the undisputed evidence showed that they were exempt from training and service as ministers of religion under Section 5 (d) of the Selective Training and Service Act of 1940.

This matter has been extensively briefed and argued before this Court in previous cases. The argument made in those cases is relevant here. It is far more extensive than will be made here because petitioners are of the opinion that the issues presented under this point will not be reached if the Court accepts the contentions which petitioners have made under Point One.

However, as a precautionary measure and to answer the anticipated argument that will be made by the Government in these cases, which was advanced in the court below, petitioners will briefly discuss the point here raised. In the event this discussion is not sufficient to satisfy the Court in support of the point then, before accepting the argument of the Government, the Court is respectfully referred to the argument appearing at pages 83-131 of the Joint Brief for Respondent Kulick and Petitioner Sunal in Nos. 840 and 535, October Term, 1946, and the argument appearing at pages 105-190 of the Joint Brief for Petitioners filed in *Smith v. United States*, No. 66, October Term, 1945, and *Estep v. United States*, No. 292, October Term, 1945.

The holding of the draft boards is in direct conflict with the holding of the Seventh Circuit Court of Appeals in *Hull v. Stalter*, 151 F. 2d 633.

Moreover, the draft boards' holding is out of harmony with the dictum expressed on the same question by other circuit courts in *Lehr v. United States* (CCA-5) 139 F. 2d 919, 921-922, and *Trainin v. Cain* (CCA-2) 144 F. 2d 944, 949.

Also, the draft boards' holding, in effect, that activity of petitioners was nothing more than that of a lay worker of a religious organization and was not preaching as a minister, is directly in conflict with decisions in *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 106-109, 110, 111, 117, and *Follett v. McCormick*, 321 U.S. 573, where facts in reference to the ministerial activity were identical with facts here. In those decisions it was held that the activity of Jehovah's witnesses occupied the same high estate as do orthodox preaching from the pulpit. Furthermore, it was held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

Additionally, the draft boards' decision interpreting the Act and Regulations is in direct conflict with the administrative interpretation placed upon the Act and Regulations by the National Headquarters of Selective Service System in State Director Advice 213-B.³ The National Headquarters says that "the *regular* discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified" as a minister of religion. (Emphasis added)

The draft boards in construing the Act and Regulations contradict that statement of advice by National Headquarters.

Again the National Headquarters says that the "historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case." (Emphasis added)

That statement of advice by National Headquarters also is contradicted by the draft boards in construing the Act and Regulations.

³ The Court can judicially notice the administrative opinions and interpretations of the Act and Regulations. *Bowles v. United States*, 319 U.S. 33, 35.

Still more, National Headquarters holds that performance of secular work does not deprive a minister of his right to exemption, by saying, "In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work."

The draft boards in construing the Act and Regulations contradict also that statement of advice by National Headquarters.

And finally, National Headquarters of the Selective Service System specifically advises all draft boards that whether one of Jehovah's witnesses is to be classified as exempt "must be determined in each individual case based upon whether he *devotes his life* in the furtherance of the beliefs of Jehovah's witnesses, whether he *performs functions which are normally performed by* regular or duly ordained ministers of other religions, and finally, *whether he is regarded by other [of] Jehovah's witnesses in the same manner in which regular duly ordained ministers of other religions are ordinarily regarded.*" (Emphasis added)

That statement of advice by National Headquarters likewise is contradicted by the draft boards in construing the Act and Regulations.

A broad and liberal interpretation should be placed upon the Act by the Court. It should be held that Congress intended to extend the provisions of the exemption not only to the orthodox denominations but to the dissentient and unpopular groups as well. Certainly Congress did not intend to restrict the protecting shield of the exemption to any particular denomination or creed. Congress intended that ministers of all religious denominations and groups should share the benefit of the exemption, in the same way as did the authors of the Constitution intend to bring within the protecting shield of the First Amendment the ministers of unpopular and dissentient groups as well as those of the popular and more orthodox denominations. *Cantwell*

v. *Connecticut*, 310 U.S. 296; *Murdock v. Pennsylvania*, 319 U.S. 105; *Martin v. Struthers*, 319 U.S. 141.

Uniformly this Court has held that a broad and liberal interpretation should be placed upon the provisions of the various statutes exempting from taxation the property of religious organizations. *Trinidad v. Sagrada Orden etc.*, 263 U.S. 578; *Halvering v. Bliss*, 293 U.S. 144.⁴

Preaching activities of ministers of religion bear burdens that would ordinarily fall directly upon the government. Were it not for the eleemosynary work the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper laws. The contribution to the government through the benefits received by the people from the preaching activity of ministers of religion cannot be equaled by the government if it were to undertake such activity. The charitable work of ministers of the gospel "constitutes not only the 'cheap defense of nations' but furnishes a sure basis on which the fabric of civil society can rest, and without which it could not endure." *Trustees of First M. E. Church South v. Atlanta*, 76 Ga. 181, 192; *M. E. Church South v. Hinton*, 92 Tenn. 188, 190, 21 S. W. 321, 322; *People v. Barber*, 42 Hun (N.Y.) 27; *Comm'th v. Y.M.C.A.*, 116 Ky. 711, 76 S.W. 522.

These same arguments as grounds for exemption of the minister of religion from all training and service in the armed forces were duly considered by the House Committee

⁴ *Trustees of Griswold College v. State*, 46 Iowa 275; *Watterson v. Halliday*, 77 Ohio St. 150, 82 N.E. 962; *Mattern v. Canevin*, 213 Pa. 588, 63 A. 131; *Congregational Society of Town of Poultney v. Ashley*, 10 Vt. 241, 244. Cf. *Sharraai Berocho v. New York*, 60 N.Y. Super. Ct. 479, 18 N.Y.S. 792.

on Military Affairs at hearings had upon the Burke-Wadsworth bill, H. R. 10132. (Hearing before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Session, July 30, 1940, pp. 299-305, 628-630) When the bill was before Congress, for consideration before passage, members of Congress declared that the exemption was for the purpose of maintaining the institutions of religions during the war and to insure the performance of and to guarantee that the people would receive religious training and guidance during the war. 55 Cong. Rec. pp. 936, 1473, 1527.

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and Service." *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-42 (Government Printing Office, Washington) p. 239.

In speaking of this exemption in *Trainin v. Cain* (CCA-2, 1944) 144 F. 2d 944, it was said that ministers were exempt in order to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."

In order to give the Act and Regulations the broad interpretation contended for here, it is not necessary for the Court to strain the language of the Act and Regulations. Indeed, all that has to be done is to put a reasonable interpretation upon the language of the Act and Regulations in the light of history. The Act provides: "Regular or duly ordained ministers of religion and students who are preparing for the ministry . . . shall be exempt from training and service (but not from registration) under this Act." (Selective Training and Service Act, 54 Stat. 887, 50 U.S.C. App. § 305 (d)) The Regulations define a *regular minister of religion* to be "a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he

is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." (Reg. 622.44 (b))

"A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." (Reg. 622.44 (c))

These definitions do not say that the minister must be a member of an orthodox denomination. They do not exclude from their provisions any member of any dissentient organization.

The term "regular minister" is used in the Regulations. The term "regular minister" has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. *Ex parte Cain*, 39 Ala. 440-441.

It is to be observed that the Regulations use the word "customarily". *Customary*, the word from which it is derived, is synonymous with "usual" and "habitual". It does not mean *continuously*. It is not synonymous with *continuously, uninterruptedly, daily, hourly, or momentarily*. The Century Dictionary defines "customarily" to mean "in a customary manner; commonly; habitually." Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit

to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores, and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching. If he regularly and customarily preaches during the week, he is a regular minister of religion under the Act and Regulations. The source of his income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain himself is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support, is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in determining whether or not the minister regularly and customarily teaches and preaches.

When the pioneers came to this country and settled it the ministers came along with them, working during the week and preaching regularly on Sunday. When the early settlers pushed into the midwest and the west and pioneered through to the Pacific coast ministers of religion went along, accompanying them, working in the woods and fields and following various secular occupations on six days of each week and regularly and customarily preaching on Sundays. Indeed, even today, in the small towns throughout the nation and in the rural areas are to be found thousands upon thou-

sands of ministers of various religious denominations who work at secular work during the week to support themselves and who on Sunday regularly and customarily preach as do clergymen of the more wealthy congregations in the cities. True, there are scores of thousands of more ministers in the towns and cities, especially the large cities, who have been called by congregations sufficiently large and wealthy to provide them with an income that relieves them of the need to labor during the week. Surely Congress did not mean to say, when it wrote the exemption into the Act, that it was to be extended only to such clergymen of the wealthy congregations able to support their respective ministers so that they would not be required to work at any secular avocation.

It should be remembered that Christ Jesus' apostle Paul, the foremost spokesman of the early Christian church, worked regularly at making tents. He chose to support himself by secular work rather than to be a charge and burden upon the poor people to whom he ministered publicly and from house to house.³

³ "Paul departed . . . to Corinth; and found a certain Jew named Aquila, . . . with his wife Priscilla . . . and came unto them. And because he was of the same craft, he abode with them, and wrought: for by their occupation they were tentmakers. And he reasoned in the synagogue every sabbath, and persuaded the Jews and the Greeks." (Acts 18:1-4) "Paul . . . sent to Ephesus, and called the elders of the church. And when they were come to him, he said unto them, Ye know . . . how I kept back nothing that was profitable unto you, but have . . . taught you publicly, and from house to house." (Acts 20:16-20) "But we exhort you, brethren; . . . to work with your hands . . . and be dependent on nobody." (1 Thessalonians 4:10-12, *Revised Standard Version* (New York, 1946, Thomas Nelson & Sons); compare Ephesians 4:28, *R.S.V.*) "For you yourselves know how you ought to imitate us; we were not idle when we were with you, we did not eat anyone's bread without paying, but with toil and labor we worked night and day, that we might not burden any of you. It was not because we have not that right, but to give you in our conduct an example to imitate. . . . For we hear that some of you are living in idleness, mere busybodies, not doing any work. Now such persons we command and exhort in the Lord Jesus Christ to do their work in quietness and to earn their own living. . . . The Lord be with you all. I, Paul, write this greeting with my own hand." (Emphasis added) 2 Thessalonians 3:7-17, *R.S.V.*

To construe the Act and Regulations so as to *exclude* ministers who are forced, or who, as Paul, deliberately choose, to resort to secular work to sustain themselves in the ministry and thus to enable themselves to minister gratuitously to the poor and needy and themselves "be dependent on nobody", is to impute to Congress the intention of limiting the benefit of the exemption to the big-town and city ministers. So to construe the Act results in the inequality which Congress ever seeks to avoid. So to construe brings only the un-American result of excluding from 'equal protection of the law' those ministers of small towns and rural communities of the country who are either unable or unwilling to enjoy wealth that enables big-town and city ministers to escape the need to labor to support themselves and their dependents. Surely Congress intended to provide the benefits of exemption for ministers of rural and small-town parishes as well as for ministers who chose to answer the call of opulent congregations in 'Big Town' and metropolis. Seen in true perspective, the Act's generous provision for exemption of ministers within the Congressional intent contrasts strikingly with the deficient and inequitable definition of the scope of that provision the court below undertook to carve out of the law in the instant case.

In absence of express provision in the Act and Regulations excluding from the shield of the exemption ministers regularly or customarily preaching who support themselves by their own labor at secular jobs, it must be assumed that Congress intended to include those as well as the ministers able to enjoy benefits of his parishioners' wealth so as to excuse him from need to toil for his own livelihood during the week.*

* Even the National Headquarters of the Selective Service System recognizes that ministers of many denominations are required to perform secular work in order to sustain themselves while engaged in the ministry. State Director Advice 213-B, Part III, ¶3. [80]

At present there are a large number of clergymen and ministers of Protestant and Jewish denominations who depend for their support upon secular work. In the Northern Baptist Convention 20 percent of all clergymen in rural sections "help earn their keep by work not connected with their churches." (Hartshorne and Froyd, *Theological Education in the Northern Baptist Convention* (1945), Judson Press, Philadelphia, p. 72. In the Southern Baptist Convention the percentage is much higher.

Twenty-four percent of all Protestant clergymen in the United States in 1939 received less than \$600 annual salary from their respective churches, of which 14 percent received less than \$99 annually. "There is nothing to indicate that those in the lower brackets also had other occupations, although it is a safe guess that many of them did." (Landis, *Yearbook of American Churches* 1945, Federal Council of Churches of Christ in America, Sowers Printing Co., Lebanon, Pa., p. 155; see also United States Bureau of Census, Series P-16, No. 8, 16th Census.)

It is well known that the majority of the ministers of the Society of Friends (Quakers), Church of Jesus Christ of Latter-day Saints (Mormons), Mennonites, and many others are dependent entirely upon secular work for their support, no salary being paid to their ministers as a general rule.⁷

It is to be observed that petitioners actually devoted as much time to preaching and the duties of the ministry as do the clergymen who have congregations wealthy enough to support them without performance of secular work. They spent many hours monthly in house-to-house missionary work, and preaching before the congregation, studies,

⁷ "I am the only person in the church," [Brigham] Young said to Greeley in 1859, "who has not a regular calling apart from the church service"; and he added, "We think a man who cannot make his living aside from the ministry of the church unsuited to that office." Linn, *The Story of the Mormons* (1902, The Macmillan Co.) p. 576.

special meetings and performance of congregational duties. The orthodox church-sustained clergy do not spend any more time in their preaching activities, yet they do not sustain themselves by secular work as did petitioners Thompson and Roisum.*

Throughout history of religious organizations ministers have been distinguished from church-sustained clergy. Even the self-supporting ministers contributed more than the clergy to the spread of religion along with the pioneers in the days of expansion to the West.

"... about the anniversary meetings, ... a brief, summary view. ... About two hundred of God's ministers were in attendance, all told—for *all* are ministers, servants of the truth, from our standpoint and from the standpoint of God's word; in which all are recognized as *priests*—of the royal priesthood ... The general sentiment ... was, that they would be all the more diligent hereafter to pass the pleasant bread of truth to the hungry sheep of the Lord." *Watch Tower*, April 1890, Vol. XI, No. 5, p. 1.

"The church has always been more successful in winning kingdoms for her Christ, when she has adopted just this lay preaching method. ... The whole church a royal priesthood, and so the whole church a preaching church, that is the New Testament ideal." *Lay Preaching* (Secretary's Annual Report), Hoyt, American Baptist Publication Society, 1869, New York, p. 21.

The only way the preaching job could be successfully done in the pioneer days was said to be "by the preaching and teaching, under Episcopal direction, by laymen deriving their support from their own secular labors." *The Missouri Valley and Lay Preaching*, Wharton, 1859, New York, p. 18.

"Although made the special work of certain representative disciples, it is, in fact, enjoined upon the Church as

* Petitioner Cox devoted all his time to the ministry.

a whole, and upon its members in particular, 'as of the ability which God giveth' (1 Pet. 4: 10, 11) . . . From these scriptural examples, it is just to infer that lay preaching, in the various forms of teaching, evangelizing, and prophesying, had from the first a double object: 1, to do good to all men; and, 2, to develop and prove the gifts of those who from time to time were called from the ranks of the laity to the more public ministry of the Word. Such, doubtless, continued to be the practice of the Church during the early centuries, and it was only by degrees that it became modified under the hierarchial spirit which became developed at a later period. . . . In the Reformed churches there was a general breaking away from the trammels of ecclesiasticism, together with an energy of purpose which did not scruple to employ any agencies at its command for the dissemination of truth. . . . The first formal and greatly effective organization of lay preaching as a system, and as a recognized branch of Church effort, took place under John Wesley at an early period of that great religious movement known as the revival of the 18th century." *Cyclopedia of Biblical, Theological, and Ecclesiastical Literature*, McClintock and Strong, New York, Harper & Bros., 1880.

The English Court of Appeal held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord v. Hiscock*, 86 L. J. K. B. 941) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the Justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear

that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Saskatchewan held that a registrant was entitled to exemption from all training and service as a minister of religion. (*Bien v. Cooke*, 1944, 1 W. W. R. 237) There the minister spent six days a week farming. No special educational requirements were necessary. All that was required was that he satisfy the general secretary, who was a railroad engineer, that he believed the New Testament, and that he met the necessary moral requirements.

The United States Circuit Court of Appeals for the Second Circuit, in *Trainin v. Cain*, 144 F. 2d 944, said that the regular performance of secular employment was not incompatible with the claim for exemption as a regular minister of religion: "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."

The holding in the *Trainin* case is not apposite here. However, the dictum of the opinion in that case may help this Court to find that petitioners are regular ministers of religion. It should be observed that in the *Trainin* case the Second Circuit Court of Appeals found that the registrant did not regularly perform his functions as a rabbi. Moreover, the court found in the draft board record in that case that Trainin never pressed his claim very strongly. Also the court found that his testimony and proof concerning the regular performance of his functions as a rabbi were thoroughly discredited. No such circumstances exist in the instant cases. Petitioners were not discredited in their testimony. There was no doubt that they performed regularly duties as ministers of religion. There was no question

as to their good faith. There was no evidence offered that they did not perform duties as ministers of religion.

Even assuming, for the purpose of argument only, that petitioners are not, in the opinion of the Court, regular ministers of religion within the meaning of the Act and Regulations, they are, nevertheless, ordained ministers of religion.⁹ Under the circumstances that petitioners are ordained and regularly performed their duties as ordained ministers, "a more difficult question" is presented. *Trainin v. Cain*, 144 F. 2d 844.

Since neither the Act nor the Regulations exclude dissentient groups, they cannot be construed by the court to exclude unorthodox ministers. It must be assumed that the Act and Regulations were intended to embrace within the exemption the ministers of all denominations, whether popular or unpopular, orthodox or unorthodox. Any other view would require us to impute to Congress the intention of discriminating between religious denominations and ministers according to nebulous or arbitrary standards, with resultant inequitable, crotchety application of the statute as attempted by the court below in the instant cases.

A realistic approach to the construction of an act providing for benefits to religious organizations requires that the federal courts make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton v. Howe*, 31 Beavin 14). The theory of treating all religious organizations on the same basis before the law is well stated in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which

⁹ Selective Training and Service Act, § 5 (d); Selective Service Regulations, § 622.44.

does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided in Section 5 (d) of the Act for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern v. Lutheran Churches*, 1 Sandf. Ch. 439, 507 (N.Y.)) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahue v. Richards*, 38 Me. 379, 409. Cf. *People v. Board of Education*, 245 Ill. 334, 349; *Grimes v. Harmon*, 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshipping the Supreme Being." (*State ex rel. Freeman v. Scheve*, 65 Neb. 853, 879, 93 N.W. 169) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People v. Steele*, 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the

widest possible scope."—*State ex rel. Freeman v. Scheve*, 65 Neb. 853, 878, 93 N.W. 169.

Neither Shakers nor Universalists will be discriminated against in distributing the avails of land granted by Congress in 1778 for "religious purposes." (*State v. Trustees of Township*, 2 Ohio 108; *State v. Trustees*, Wright 506 (Ohio).) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual opinion in administering justice. (*People v. Pillow*, 3 N.Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence v. Fletcher*, 49 Mass. 153; *Gass v. Wilhite*, 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine was contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison v. Brophy*, 59 Kans. 1, 5, 51 P. 835; cf. *Methodist Church v. Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); *Andrew v. New York Bible and Prayer Book Society*, 6 N.Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law.—*Waite v. Merrill*, 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245.

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been

directed, as they are now, at politically helpless minorities."

—*Minersville v. Gobitis*, 340 U.S. 586.

In the case of *Ex parte Cain*, 39 Ala. 440, in determining whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemption, saying: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

In the decision styled *In re Reinhart* (9 Ohio Dec. 441, 445) the court said: "The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations, much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican and Greek churches; consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers.'"

The intent to give the Regulations a broad, liberal interpretation as to what constitutes a minister of religion is proved in the fact that the terms of the Act and Regulations have been extended to include within the exemption provision "Lay Brothers" of the Holy Roman Catholic Church.

(State Director Advice 213-B, Part IV, subd. 2.) It should be observed that the "Lay Brothers" are not, in the strict sacerdotal sense, ministers of religion, as declared by the Director of Selective Service, who concerning the broad interpretation to be placed upon the Act said: "Freedom to worship is one of the four freedoms for which we fight. Even in days before we realized that our civilization was to be challenged, even to its religious roots, it was felt that regular and duly ordained ministers should be exempted from military duty. . . . The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's witnesses, who sell their religious books, and thus extend the Word. It includes *lay brothers* in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion."¹⁰ (Emphasis added)

"Lay Brothers" of the Holy Roman Catholic Church are not priests, nor in line for the priesthood, of the Roman Catholic Hierarchy. "We may distinguish two types of Brothers; viz.: those who directly serve the people at large for example, by teaching, and those who do so indirectly, namely, by directly serving priests or other religious who in turn serve the people directly. . . . Let us consider the offices performed by the second group a little more closely. These men do the manual work necessary in religious communities and institutions. Their ministrations, given freely, are absolutely necessary, if the priests are to be free to attend to their special work. Hence, the argu-

¹⁰ *Selective Service in Wartime*, Second Report of the Directory of Selective Service, 1941-42 (Government Printing Office, Washington) pages 239-241.

ments which prove the need of clergy prove likewise the need of these . . . very important members of religious communities. They also ought, therefore, to be exempted." ¹¹ Menial work and entire absence of the doing by them of any strictly ecclesiastical duties constitute the whole functional status of one very important of two types of "Lay Brothers". They do not conduct religious services of any kind and many are declared to be uneducated and "unable to attain the degree of learning requisite for Holy orders" but "able to contribute by their toil" and "able to perform domestic services or to follow agricultural pursuits". ¹²

The Government urges upon this Court that Jehovah's witnesses make no distinction between "shepherd and flock". This is error and contrary to the facts. Jehovah's witnesses make a distinction between "shepherd and flock". Jehovah's witnesses consider that they are the "shepherds" because they preach to and teach the people as ministers of Almighty God, Jehovah, under His appointed Good Shepherd, Christ Jesus. This they do from door to door and publicly, as did Christ Jesus, His apostles, the disciples, and the thousands of Christian ministers who were associated with them in the various congregations at Jerusalem, Antioch, Alexandria, Corinth, Rome, and elsewhere. The "flock" served by Jehovah's witnesses is to be found in the homes

¹¹ Kennedy (Congressman Martin J.) letter to House Military Affairs Committee, August 7, 1940, *Hearings*, etc., 76th Cong., 3d. Sess., on H. R. 10132, pp. 628-630.

¹² *The Catholic Encyclopedia* (1907, Robert Appleton & Co., N.Y.) Vol. 9, p. 93. "Lay Brothers" who do not preach from the pulpit, and who do not minister the sacraments or otherwise function as do the ordained Catholic clergy, number at present, in the United States, more than 10,000. (Official Catholic Directory 1946, New York, P. J. Kenedy & Sons) That, it is to be observed, is more than twice the entire number of some 4,000 of Jehovah's witnesses who have been illegally classified and committed to prison under the Act because certain draft boards did not regard them as having, under the law, a standing equivalent to that of Roman Catholic priests and the clergymen of other popular orthodox denominations.

of the people, where Jehovah's witnesses conduct Bible studies, servicing millions of persons annually.¹³

Moreover, there are 70,000,000 people in this country who do not belong to any church, as well as many other millions belonging to a church who do not attend. These millions need to be served by missionary evangelists. Jehovah's witnesses have answered the need by calling upon the people as missionaries from house to house.

In performing their missionary work, Jehovah's witnesses act as ministers, going to the congregation. They, unlike orthodox clergymen, do not require the congregation to come to them. Jehovah's witnesses act as servants to the people, as did the Lord Christ Jesus, who was a humble servant of the people of good will whom He met in His door-to-door missionary work.¹⁴

Each one of Jehovah's witnesses must preach in order to be one of Jehovah's witnesses. One who does not preach is not one of Jehovah's witnesses. Jehovah's witnesses are a society of missionary evangelists, engaged in missionary preaching work of the highest type, at home as well as abroad, and throughout the whole world.

It is not unusual to hear of a congress of ministers. The Jesuit organization (Society of Jesus) that functions in connection with the Roman Catholic Hierarchy is, for example, a society of ministers. Various foreign-missionary societies of the popular orthodox religious denominations are composed exclusively of ministers, ordained and un-

¹³ See 1946 *Yearbook of Jehovah's Witnesses* (New York, Watch Tower Bible and Tract Society), pp. 43-44.

¹⁴ "Whether is greater, he that sitteth at meat, or he that serveth? is not he that sitteth at meat? but I am among you as he that serveth."—CHRIST JESUS, at Luke 22:27.

"Behold, I stand at the door, and knock: if any man hear my voice, and open the door, I will come in to him, and will sup with him, and he with me."—CHRIST JESUS, at Revelation 3:20.

ordained, who preach the religions of the respective denominations only in foreign countries from door to door and house to house in the same way as do Jehovah's witnesses in the United States and in all other countries.

Therefore it is highly improper and inappropriate to compare a congregation of Jehovah's witnesses with a congregation of Baptists or other Protestant laymen-religionists, or Jews, in the orthodox sense. Of course, in those orthodox religious congregations of laymen only one or two persons minister (as recognized ministers) to the entire congregation. Such ministering consists of preaching done from a pulpit to the assembled laymen-congregants. Those preached to come to the preacher to hear him. The preacher does not go to the people at their homes as do Jehovah's witnesses. Members of congregations of orthodox clergymen do not preach as do Jehovah's witnesses. Such members or congregants are only preached to. Among Jehovah's witnesses each one of Jehovah's witnesses is a preacher and preaches regularly to hundreds, if not thousands, of others each year. Hence, to compare a congregation of laymen, served by an orthodox religious clergyman, to an assembly of missionary evangelists (Jehovah's witnesses), and by rule of thumb to say that such assembly of missionary evangelists is not a group of ministers simply because the congregation of laymen is not a group of ministers, is syllogistic and logistical legerdemain which discriminates and destroys entirely the intent of Congress in providing exemption for ministers of all denominations regardless of whether they were able to come to them or had to go to the congregation; and regardless of whether they were wealthy enough to preach without choosing or being forced to resort to secular work to support themselves in their ministry.

In concluding the argument under this point it is fitting to quote from *Hull v. Stalter* (COA-7) 151 F.2d 633, where *inter alia* it was said:

"Much is said in the briefs both complimentary and derogatory to Jehovah's witnesses. With this argument we are not concerned. Whatever a draft board or a court, or anybody else for that matter, may think of them is of little consequence. The fact is, they have been recognized by the Selective Service System as a religious organization and are entitled to the same treatment as the members of any other religious organization. . . . In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognizes two classes of ministers, (1) 'a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized charge [*sic*, properly 'church'], religious sect, or religious organization of which he is a member . . . ' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church . . . ' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (*Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated:

"The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit or platform. Such

is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone". He may give his "sermon on the mount", heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. . . . He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. . . . To be a "regular minister" of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant. . . . There is not a scintilla of proof which impugns his honesty, good faith or devotion to the cause. Respondent makes no criticism of relator [Hull] in this respect. Neither has the Selective Service System of Ohio done so insofar as relator is individually concerned. Such criticism as is disclosed by the record was directed entirely at Jehovah's witnesses as a class." *Hull v. Stalter* (CCA-7) 151 F. 2d 633.

THREE

De novo evidence as to the exempt status of petitioners should have been received and considered by the trial courts in determining whether the draft board orders were in excess of the jurisdiction of the local boards because petitioners were exempt as ministers of religion under Section 5 (d) of the Selective Training and Service Act.

The ruling of the court below, that the *de novo* evidence could not be received in the trial court for the purpose of determining the want of jurisdiction of the draft boards, is out of harmony with the applicable decisions of this Court.¹⁵

That it is beyond the authority of a draft board to order a minister of religion to report for induction contrary to the statute is plain. If one is exempt there is a complete absence of jurisdictional facts upon which to act against the individual. All that Congress required a minister of religion to do is to register his name, address, and occupation. No further duty is required of him, and the board is precluded from taking any further action against the minister. If a board wrongfully or mistakenly orders a minister to report for induction, the order is void because Congress divested the board of jurisdiction to do so. The illegal action of the board in disregarding the exempt status of the minister does not alter his status or make him liable for training and service under the Act.

Therefore, a minister exempt from duty may defend against an indictment for failing to respond to an order to report on the grounds that the classification given, the refusal to grant the exemption and the order to report for induction are void because in excess of authority of the board, or beyond the jurisdiction of the board.

¹⁵ But see the decision of the Fourth Circuit Court in *Smith v. United States*, 157 F. 2d 176.

The trial court can make an independent inquiry as to the action of the board in drafting a minister of religion, and in deciding the questions is not bound by the findings or determinations of the administrative agency, because each of the questions involved is judicial in its nature and such are not administrative discretionary matters. On this issue each petitioner is entitled to a trial *de novo* before the district court, having the right to offer oral testimony.

The *discretionary* decision of draft boards in reference to classifications of persons under a duty for training and service pursuant to the Act and Regulations are, under decisions of this Court on administrative law, final unless unsupported by substantial evidence, arbitrary and capricious or made in violation of procedural due process. However, this rule does not cover the action of the boards in reference to classifications contemplated by the statute entirely exempting and removing registrants from duty under the Act. In such cases the boards are responsible to the United States courts for a proper adherence to the statute, as much as to the classification to be given designated groups as to their personal arrangements. The distinction is well stated in *Crowell v. Benson*, 285 U.S. 22, 63, by Chief Justice Hughes: "The question in the instant case is not whether the Deputy Commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable." Accordingly, in *Wise v. Withers*, 3 Cranch 331, this Court has held that if one is of that class exempted by Congress from military duty the statute commanding duty for training and service is not applicable to the exempt person and the administrative agency has no jurisdiction.

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Crowell v. Benson*, 285 U.S. 22, 54.

In cases concerning validity of administrative orders deporting aliens, this Court has repeatedly held that such agencies have no authority to deport a citizen and that the making of the claim of citizenship supported by substantial evidence thereof constitutes a denial of jurisdiction and the finding of the agency on such 'jurisdictional fact' is not binding on the court and can be determined in a judicial trial *de novo*. In an action brought under Section 9 of the Immigration Act to recover penalties (analogous to the criminal action here), this Court said: "The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority." *Lloyd Sabaudo etc. v. Etling*, 287 U.S. 329. The same rule was followed in the earlier case of *Gonzales v. Williams*, 192 U.S. 1, 15.

In *Kessler v. Strecker*, 307 U.S. 22, 34-35, it was declared: "The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of jurisdiction conferred upon the Secretary." Mr. Justice Brandeis, in *Ng Fung Ho v. White*, 259 U.S. 276, at page 284, said: "The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service."

The court ruled in the military cases that when enlistment is denied such is a denial of jurisdiction and is a jurisdictional fact for determination by the court *de novo* without limitation by the determination made by the military agency. Likewise denial of induction authority by claiming exemption raises a question of authority of the board to act and is a jurisdictional fact to be determined by the court. *Ver Mehren v. Sirmeyer*, 36 F. 2d 876, 882; *Givings v. Zerbst*,

255 U.S. 11, 20; *In re Grimley*, 137 U.S. 147. The rule was restated by Chief Justice Hughes in *Crowell v. Benson*, 285 U.S. 22, 38.

In workmen's compensation cases there are certain facts which must exist before the operation of the statutory scheme can begin. As to such 'jurisdictional facts' the final arbiter is the court, not the agency. *Crowell v. Benson*, 285 U.S. 22. So also is the rule in *abandonment of line* cases concerning Interstate Commerce Commission determinations, such as whether trackage is "spur" or "industrial". In *United States v. Idaho*, 298 U.S. 105, 109-110, the Court said:

"Appellants object that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Gagg Bros. v. United States*, 280 U.S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court; not to the final determination of either the federal or a state commission." This particular quotation should show conclusively the error of the court below in approving the action of the district court of excluding all the evidence offered *de novo* by petitioners to show proof of their ministry and exempt status under the Act. On January 3, 1944, this Court approved the *Idaho* case, saying, *inter alia*: "Congress has not left that question exclusively to administrative determination; it has given the courts the final say." *City of Yonkers v. United States*, 320 U.S. 685, 689.

Conclusion

The judgments of the court below should be reversed and the causes remanded to the trial courts for new trials consistent with the opinion that may be written herein.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioners

FILE COPY
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 66

WESLEY WILLIAM COX

Petitioner

v.

THE UNITED STATES OF AMERICA

No. 67

THEODORE ROMAINE THOMPSON

Petitioner

v.

THE UNITED STATES OF AMERICA

No. 68

WILBUR ROISUM

Petitioner

v.

THE UNITED STATES OF AMERICA

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

HAYDEN C. COVINGTON

Counsel

SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF FOR PETITIONERS

MAY IT PLEASE THE COURT:

The main part of the brief of the Government is designed to lure this Court into unconsciously upsetting *sub silentio* its ruling in *Dadez v. United States*, 327 U. S. 114, where an identical argument made by Dodez in his Reply Brief was rejected by this Court. In the companion case of *Gibson v. United States*, 327 U. S. 114, the Government made the same contention on an almost identical record as here made. It was rejected for the reasons here urged by petitioners. In fact in those two cases the Government made an inconsistent argument. It was said Dodez should be sent back for a new trial while it was urged that Gibson's case should, because of harmless error, be affirmed. The Government's position here is inconsistent with what it said in *Dodez*, which is here quoted. "If the defense of illegal classification is open to petitioner and if this Court remands the case for a new trial, the Government will be afforded the opportunity to determine whether to proceed further with the litigation in view of the new issue in the case. If a new trial is had petitioner will have an opportunity to present squarely the question whether there is any foundation in the facts before the selective service boards for rejecting his claim to classification as a minister, in accordance with the standard of judicial review set forth in the *Estep* case." (Brief for the United States, pp. 13-17, *Dodez v. United States*, No. 86 October Term 1946) In the *Dodez* case the evidence was fully developed by receipt of the draft board file and other evidence into the record the same as in these cases. The error for reversal was in the charge to the jury, the same as in these cases.

It is urged that the Court has the same power as it would have in habeas corpus proceedings. This specious argument plainly appears to be a fallacy. Habeas corpus is a civil proceeding. These are criminal actions. In habeas corpus the burden is on the prisoner to prove his case.

Here the burden is on the Government to prove guilt beyond a reasonable doubt. Here there is the presumption of innocence. Here there is a guarantee of trial by jury. The Constitution commanded the trial judges in these cases to submit all questions of fact and mixed questions of law and fact to the jury. The trial judges did neither of these. The Constitution precluded the trial court in each of these cases from instructing the jury to find the petitioners guilty. The trial courts in all cases implicitly instructed the jurors to return verdicts of guilty. The trial courts invaded the province of the juries. It was the exclusive prerogative of the jury to pass on the guilt of the petitioner in each of these cases. They were deprived of their freedom to pass on the issues in the cases. *Sparf v. United States*, 156 U. S. 51, 100-103, 106-107.

The Government says because these prosecutions are based on alleged violations of administrative orders, the validity of which depends on whether there is basis in fact for them, that the defense is one of law in each case. It vigorously argues that there can be no question of fact because all questions of fact before the board are made final by the decision of the boards under the Act. This is the same old argument condemned by this Court in *Estep v. United States*, 327 U. S. 114, which has been clothed with more deceptively alluring dress and sent slithering back into the Court again. *Estep* held that the classification by the board was final only when there was basis in fact to support it. If a registrant is exempt there is no basis in fact for the action of the board. The final say on such question rests with the courts and not with the boards. Whether one is a minister exempt may be a question of law, one of fact or a mixed question of law and fact depending on the circumstances of the case. If it is one of fact or a mixed question of law and fact then the jury rather than the court must decide.

This Court has said "in reviewing an administrative

order, it is ordinarily preferable, where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute." *Cardillo v. Liberty Mutual Insurance Company*, 67 S. Ct. 801, 804-805. On reviewing a draft board order the inquiry is the same, requiring the court to determine whether there is no basis in fact for the denial of the claim for exemption. *Estep v. United States*, 327 U. S. 114. The law "has not left that question exclusively to administrative determination; it has given the courts the final say". *City of Yonkers v. United States*, 320 U. S. 685, 689. The nature and scope of review of jurisdictional fact questions in draft cases was fully discussed in the Joint Brief for Petitioners filed in *Smith v. United States*, No. 66 October Term 1945 and *Estep v. United States*, No. 292 October 1945. The argument there made is here referred to and adopted as a part of this reply brief. See pages 105-131.

It is not a novel proposition of law to permit a jury to pass upon issues first submitted by law to an administrative agency. Especially is this true where, as here, the issue to be determined is the lack of authority of the administrative agency to make the order. Whether there is basis in fact for ordering a minister to do training and service under the Act is a "jurisdictional fact" to be determined by the jury. Similar questions in judicial proceedings to review administrative determinations have been held to be for the jury. *Miller v. Horton*, 152 Mass. 540; *Pearson v. Zehr*, 138 Ill. 48; *State v. Rachskowski*, 86 Conn. 677; *People v. McCoy*, 125 Ill. 289. The courts have held that the validity of draft board determinations and orders is properly an issue of fact to be decided by the jury. *Smith v. United States*, (CCA-4) 157 F. 2d 176; *United States v. Zieber*, (CCA-3) 160 F. 2d 90.

A typical and most common administrative order reviewed by the jury in proceedings brought for judicial

review is that made in workmen's compensation cases. In some states the appeal from an award of an industrial accident commission is to a trial court of general jurisdiction. In such states there are to be found hundreds of decisions by the appellate courts holding that administrative rulings and determinations are questions of fact or mixed questions of law and fact that should be decided by the jury. *Alfredson v. Department of Labor*, 5 Wash. 2d 648; *Industrial Commission of Ohio v. Warren*, 115 Ohio St. 482; *Roma v. Industrial Commission of Ohio*, 97 Ohio St. 247; *Standard Accident Insurance Company v. Williams*, (Tex. Com. Appls.) 14 S. W. 2d 1015; *Hicks v. Georgia Casualty Company*, (CCA-5) 63 F. 2d 157.

Even where the evidence is undisputed but different minds may reach different conclusions the courts have held that the correctness of administrative determinations may be determined by the jury. *Van Koten v. State Industrial Accident Commission*, 110 Or. 574. This is, of course, similar to the rule of this Court holding that it is for the jury to draw the inference from circumstances established by undisputed evidence in actions brought against railroads under the Employers' Liability Act, *Ellis v. Union Pacific*, 67 S. Ct. 598; *Lavender v. Kurn*, 327 U. S. 645.

Yakus v. United States, 321 U. S. 414, is not in point and does not control here. In that case there was no provision for judicial review in the district court. Judicial review was fixed by statute exclusively in the Emergency Court of Appeals. *Yakus*, like the petitioner in *Falbo v. United States*, 320 U. S. 549, had not exhausted his administrative remedies. Here the situation is quite different. Judicial review is available in the district courts since petitioners exhausted their administrative remedies. The court—judge and jury—must perform its functions as in any other criminal case. No other judicial tribunal has been vested with exclusive jurisdiction and therefore *Yakus v. United States*, 321 U. S. 414, does not apply. *Monongahela*

Bridge Company v. United States, 216 U. S. 177, being a case where judicial review on the ground was not permitted under the Act, is also not in point. The liquor violation cases (*Steele v. United States*, 267 U. S. 505; *Ford v. United States*, 273 U. S. 593) where attacks made against search and seizure orders were held to be matters of law for the court to decide, are not apposite. The search and seizure violations were not defenses but were legal questions concerning admissibility of evidence ruled on by the trial judge. It would have been quite different if the illegal seizure had been an element of the crime or a defense to the charge. Therefore the decisions are not in point.

The case of *Pagg v. United States*, 280 U. S. 420, being one where the judicial review was statutory for the purpose of testing an order made within the authority of the agency rather than to determine the lack of jurisdiction of the board, is not controlling here. In these cases the inquiry is to ascertain the basic fact of whether the men were ministers, exempt from training and service, and for that reason there was no basis in fact for the classification given.

The Government has read the mind of Congress and now writes into the Act that which Congress neglected to write! It says that it was intended that the district judge in prosecutions under the Draft Act performs a function like that which Congress remembered to write in the Price Control Act! The trial judge is said to have the same powers and duties in each of these cases as the Emergency Court of Appeals has. That is a new theory. It is an afterthought. Such ex post facto amendment of the law without specific sanction from Congress cannot be accepted. It should be rejected. The district court, of which the jury is a part, has jurisdiction of these prosecutions rather than the district judge. The function of the district judge in these cases is no different from that in any other criminal cases.

The spurious argument of the Government if accepted will reverse the holding of the Court in the *Estep* case.

(327 U. S. 114) The argument is fallacious and factitious. To prove it read: "The board having found the facts, there is no occasion for intercession by the jury." (Government's Brief, page 32) This Court held in *Estep* that the finding of the board was not final in all cases especially where there is claimed to be a want of jurisdiction. Now the Government again holds differently.

In petitioners' cases because they are criminal actions the petitioners have an advantage over the Government. The Government cannot claim the right to an instructed verdict. *United Brotherhood v. United States*, 67 S. Ct. 775, 782. Petitioners are privileged to move for an instructed verdict and did so move. They are entitled to judgments of acquittal as a matter of law. The reason is that in each case the undisputed evidence shows they are exempt as ministers of religion. However if this Court finds that different reasonable minds could draw different reasonable conclusions from the evidence before the draft boards then the issue of petitioners' exemption was one of fact or one of mixed fact and law for the jury and the jury alone in each case to decide under appropriate instructions from the judge of the trial court in each case.

The constitutional right of trial by jury to judge the facts has not been removed in draft prosecutions or in any other criminal case. It still remains. Section 11 of the Act provides that those who violate a duty are guilty. Those who have no duty because exempted by Congress cannot be convicted. No duty is imposed until there is a valid classification and order. It is for the jury to find the guilt of one under the Act including the issue of whether there is basis in fact for the classification given. In all cases where the trial court does not grant a judgment of acquittal the jury should be, in every case, permitted to decide if there is no basis in fact for the classification given or other violations of the regulations.

The conceded errors of the trial courts in their instruc-

tions and rulings that the illegality of the draft board proceedings in these cases was not a material defense cannot be cured by a holding of the court of appeals upon trial de novo that the draft board orders were legal. The function of the district court was not performed regardless of whether the issue was one for the judge or the jury. In *Gibson v. United States*, 327 U. S. 114, the trial was before the judge without a jury. The jury was waived making the issue solely for the judge. Nevertheless this Court reversed and remanded rather than render the judgment which the Government urged should have been rendered by the trial court.

Because petitioners did not get a judicial trial in the district court on the only contested issue involved which was their only defense, the judgments should be reversed and remanded to the trial courts for further proceedings.

The Government's argument against the ministerial status of petitioners will not be replied to in full. It was anticipated and adequately answered in the main brief. But some isolated arguments deserve reply.

It is contended that Roisum became a minister after registration to evade and dodge the draft. Neither the draft board, the appeal board nor the trial court so found or intimated such. The mere fact that one takes up a deferred or an exempt status like becoming a judge, governor, Congressman, or minister after registration does not prove dishonesty or draft evasion. Legal avoidance of the draft does not constitute illegal evasion of it anymore than legal avoidance of taxes constitutes illegal evasion of taxes. When Roisum changed his status he was entitled to show the board and it was the duty of the board to classify him according to his status when the final classification was given him by the board of appeal.

This conclusion here contended for is supported by the decision of the Seventh Circuit Court of Appeals in the case of *Hull v. Stalter*, 151 F. 2d 633. There the facts were

on all fours with the facts in Roisum's case. There Hull—one of Jehovah's witnesses—filed a questionnaire showing he was preaching the gospel as a part-time minister of Jehovah's witnesses and was engaged in secular work as a stenographer for a pottery company in Crooksville, Ohio.¹ Before his final classification he informed the local board that he intended to start in the full-time ministry in September 1941. However, he did not actually begin in his assigned territory until October 1941. On September 18, 1941, the local board placed him in Class I-A-O.² In other words, like Roisum, while his case was pending before the board of appeal he changed his status to that of a minister. The Seventh Circuit Court of Appeals held that the District Court³ was correct in concluding that Hull was entitled to be classified as of the date of his final classification. In that connection the court said:

"There is another question which under some circumstances might be of considerable moment, that is, whether relator's classification should be determined according to his status at the time of his registration or at the time of his final classification. The record before us, however, leaves little room for any contention in this respect. The court in its opinion stated: In the argument of counsel at the conclusion of the hearing it was conceded by the government that each registrant is entitled to be classified as of the time the classification is made rather than as of the time he registers, or, for that matter, as of any other time. The government here contends that this statement by the court was erroneous, relying on an inquiry directed by the court to a member of the Indiana Selective Service System and the latter's response thereto. We agree that this response

¹ See pp. 127, 131, 135 of printed record in *Hull v. Stalter*, No. 8869, USCCA-7, October Term, 1945.

² *Ibid.* pp. 127, 133, 136, 150.

³ *Hull v. Stalter* (USDC-ND-Ind.) 61 F. Supp. 732.

furnishes meager, if any, support for the court's statement. However, the record also discloses that the case, at the conclusion of the testimony, was argued by counsel for both sides and this argument, or the greater portion thereof, is omitted from the transcript. Under such circumstances we are unable to say that the court's statement is incorrect; in fact, we think that we must accept it.

"Moreover, we also have read the regulations and are of the view that this purposed concession on the part of the government was correct. We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5 (h) of the Act, which provides that 'no . . . exemption or deferment . . . shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than at the time of registration. . . ."

In the Government's brief it is stated that there "are no issues of credibility, and there are no questions concerning the weight to be given various items of evidence." (Br. p. 29) It seems to be inconsistent to contend that Roisum was a draft evader in light of this statement.

The United States Circuit Court of Appeals in the *Rase* case quoted from by the Government, (129 F. 2d 204) and several other courts have had occasion to pass upon the question of whether the particular members of Jehovah's witnesses involved constituted ministers of religion within the meaning of Section 5 (d) of the Act.⁴ Not stopping to debate the propriety of the holding in those particular cases, it should be observed that certain erroneous principles were announced and certain discriminatory remarks concerning Jehovah's witnesses were made clearly indicating that the courts in considering the status of Jehovah's witnesses under Section 5 (d) of the Act have erroneously and unfairly applied the orthodox yardstick. If the courts in attempting to extract the intent of Congress as to what was a "minister of religion" within the meaning of the Act had not limited their perspective by the orthodox classes but had looked at the ministerial missionary evangelistic work of Jehovah's witnesses through clear uncolored glasses of law they would have seen that all of Jehovah's witnesses who are regularly preaching the gospel are ministers of religion as much as the clergy of the orthodox religions who are properly recognized as ministers of religion under the Act and Regulations.

These courts have judged Jehovah's witnesses according to the standards of the orthodox religious denominations that have rigid creeds, ecclesiastical laws and traditional canons. These courts should not have compared the record made in these cases with the background of the personal religious experience of the judges of the courts that made the activity of Jehovah's witnesses appear exotic. If the

⁴ United States v. Messersmith (CCA-7) 138 F. 2d 599; *Rase v. United States* (CCA-6) 129 F. 2d 204; *Buteali v. United States* (CCA-5) 130 F. 2d 172; *United States ex rel. Altieri v. Flint* (D. C. Conn.) 54 F. Supp. 889, aff'd 142 F. 2d 62 (CCA-2); *Ex parte Stewart* (D. C. Cal.) 47 F. Supp. 415; *Ex parte Yost* (D. C. Cal.) 55 F. Supp. 768; *United States ex rel. Lawrence v. Commanding Officer* (D. C. Neb.) 58 F. Supp. 933; *Seale v. United States* (CCA-8) 133 F. 2d 1015.

courts had employed a realistic approach they would have been driven to the conclusion that Jehovah's witnesses constitute a religious denomination and that their ministers are actually preaching, and thus come within the exemption intended by Congress to extend to all religious organizations.

Moreover, these courts, in the decisions rendered where these erroneous conclusions were reached, considered only tangentially the question of whether Jehovah's witnesses were entitled to claim the exemption. Most of those decisions did not require the court to pass upon the merit of the claim made before the draft boards by Jehovah's witnesses. In most of said opinions the courts decided the appeals in the criminal cases adversely to Jehovah's witnesses, holding that they were not entitled to challenge the legality of the classification given them because they had not exhausted their administrative remedies by reporting for induction. Accordingly, the discussion in those opinions, as to whether Jehovah's witnesses are ministers under the Act and Regulations, was wholly unnecessary to the decision made in each of those cases. Such discussions were *dicta*.

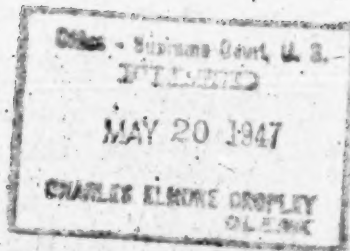
Conclusion

Petitioners respectfully submit that for the reasons above stated, and for the reasons disclosed in their main brief filed in these cases; the judgments of the circuit court of appeals should be reversed and the cases should be remanded to the district courts for further proceedings not inconsistent with the opinion of the Court that may be written herein.

HAYDEN C. COVINGTON

Counsel for Petitioners

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Nos. ~~1256~~ and ~~1257~~

In the Supreme Court of the United States

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THEODORE ROMAINE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1256

WESLEY WILLIAM COX, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1257

THEODORE ROMAIN THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

These are companion cases to *Roisum v. United States*, No. 1258, this Term. All three cases involve members of the Jehovah's Witnesses sect who were convicted for deserting from Civilian Public Service Camps to which they reported. Their convictions were affirmed in one joint

opinion by the Circuit Court of Appeals for the Ninth Circuit.

No. 1256—*Cox*. Petitioner's selective service file shows that he registered under the Selective Training and Service Act on October 16, 1940, with local Board No. 2, Jackson County, Oregon (R. 8). He filed his questionnaire (Pl. Ex. No. 2, R. 9) on December 3, 1940. He stated that he was 22 years old; that since 1936 he had been employed as a truck driver hauling lumber; and that he was engaged in no other business or work. He did not claim exemption from service as a minister or as a conscientious objector.

On December 4, 1940, the local board classified petitioner in Class I, subject to physical examination, and on January 31, 1941, he was classified IV-F—not physically fit for service. The classification was changed to I-A on March 10, 1942. Ten days later, on March 20, 1942, petitioner for the first time claimed exemption from military service. He filed the form provided for registrants asserting conscientious objections to military service (Pl. Ex. No. 3, R. 9).

In this document petitioner stated that he joined the Jehovah's Witnesses sect in January 1942 and began witnessing from house to house and on street corners; that his occupation was "logging and lumbering"; and that his minister was one Elmer Halbert, the leader of the local unit of Jehovah's Witnesses.

The local board rejected petitioner's claim to exemption, but on May 25, 1942, he was again classified in IV-F, as one physically unfit for military service. On June 12, 1942, the local board reclassified petitioner in IV-E, as a conscientious objector to military service. In response to this classification, petitioner wrote the local board on June 22, 1942, requesting for the first time that he be classified as a minister of religion (R. 12). On June 26, 1942, the local board determined that petitioner was properly classified IV-E. On the same date petitioner took an appeal to his board of appeal and on December 7, 1942, the board of appeal also classified him in IV-E.

Petitioner informed the board that on October 16, 1942, he became a "pioneer" in the sect and undertook to devote 150 hours monthly to religious work. An affidavit from his minister was filed stating that petitioner had been in the sect since January 1942 and that he was serving as a minister. He also filed a statement from the Watchtower Bible and Tract Society to the same effect. (R. 12-15.)

Petitioner requested the local board to reconsider the classification, but on December 21, 1942, the board refused to do so. On May 18, 1944, the local board ordered petitioner to report for work of national importance. He reported (R. 10) to the Civilian Public Service Camp to which he

was assigned "solely for the purpose of completing the administrative process" (R. 18) and he then left the camp (R. 22).

Thereafter on October 17, 1944, petitioner was indicted (R. 2-3) in the United States District Court for the District of Idaho for having deserted from the camp, in violation of Section 11 of the Selective Training and Service Act. At his trial, the Government's evidence established that petitioner was finally classified IV-E, and that he reported to the Civilian Public Service Camp to which he was assigned and then left the camp without permission (R. 8-10, 15-17). The contents of petitioner's selective service file was received in evidence as exhibits. For his defense petitioner testified as to the events before the draft board (R. 20-22) and he testified *de novo* as to his duties as a minister (R. 21). His wife testified that petitioner was recognized by the sect as a minister, but the testimony was stricken from the record on motion of the Government (R. 23). Petitioner adduced no other evidence.

Over petitioner's objection the court instructed the jury not to concern itself with the action of the selective service boards (R. 27-28). Petitioner was convicted (R. 4) and sentenced to imprisonment for a term of three years and three months and to pay a fine of \$300 (R. 4-5). Upon appeal to the Circuit Court of Appeals

for the Ninth Circuit, the judgment was affirmed (R. 56-61, 62).

No. 1257—*Thompson*. On October 16, 1940, petitioner registered with Local Board No. 1, Jackson County, Oregon (Pl. Ex. No. 1, R. 9). In his selective service questionnaire (Pl. Ex. No. 2, R. 10) which was executed May 27, 1941, petitioner stated that his occupation was that of operating a grocery store and that, in addition, he had been a minister in the Jehovah's Witnesses sect since August 1, 1940. In the conscientious objector's form (Pl. Ex. No. 3, R. 10) which he filed at the same time, petitioner stated that he became a member of the sect in August 1940; that after completing high school in 1928 he worked as a grocery clerk and manager until 1935, as an embalmer in 1935, and as a grocery manager and owner thereafter; and that one Fred Kimmet, the local leader of the Jehovah's Witnesses, was his minister of religion.

On May 28, 1941, the local board classified petitioner in III-A, a deferred classification because of dependents. When the dependency deferment was no longer available to persons in petitioner's situation he was classified IV-E, as a conscientious objector to military service.

On November 5, 1943, petitioner took an appeal to his board of appeal and he adduced additional evidence in support of his claim to exemption. He filed a statement signed by various members

of the sect stating that they recognized him as a minister, and an affidavit by Kimmet, the local leader, stating that petitioner's record of "field service" for the year ending September 30, 1943, showed that petitioner devoted 5191½ hours in which he disposed of 46 bound books, 625 booklets and 673 magazines, and during which he made 105 "back calls" and 316 "sound attendance." Similar supporting documents corroborating petitioner's claim were also filed (see R. 14-17).

On December 29, 1943, the board of appeal by vote of 5 to 0 classified petitioner in IV-E. An order to report for work of national importance was sent to petitioner (Pl. Ex. No. 5, R. 11) and he complied with it by reporting to the Civilian Public Service Camp to which he was assigned. After reporting to the camp, petitioner promptly handed to the camp director a letter stating that he believed himself to be wrongly classified and that he would not remain at the camp (R. 21-22). Within fifteen or twenty minutes after reporting petitioner left the camp and did not return (R. 27).

On October 17, 1944, petitioner was indicted (R. 2-3) in the United States District Court for the District of Idaho in one count charging that he departed from the camp without authority, in violation of Section 11 of the Selective Training and Service Act. His trial followed the same pattern as the trial in the *Cox* case, *supra*. The

Government's proof established that petitioner was finally classified IV-E, that he reported to the camp in compliance with the board's order and that he then left the camp without authority (R. 8-11, 18-20). The pertinent contents of petitioner's selective service file were admitted in evidence (see R. 9, 10, 11, 14, 16).

For his defense, petitioner testified briefly concerning his claim to exemption as a minister (R. 24-27). On the Government's objection, he was not permitted to testify *de novo* concerning his asserted duties as a minister (R. 25). The only other defense witness was a member of the sect who testified that she recognized petitioner as a minister (R. 28).

As in the *Cox* case, the court instructed the jury that it should not concern itself with the selective service classification (R. 32) and the jury thereafter returned a verdict of guilty (R. 4). Petitioner was sentenced to imprisonment for a term of three years and three months and to pay a fine of \$300 (R. 4-5). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment was affirmed (R. 60-65).

ARGUMENT

There are two aspects to petitioners' argument:

- (1) The court erroneously excluded *de novo* evidence proffered for the purpose of showing that petitioners were in fact ministers of religion.
- (2) The court erroneously instructed the jury in

each case that the selective service classification was final and not open to reexamination by the jury.

1. *Estep v. United States*, 327 U. S. 114, settled beyond question the fact that a criminal court may not inquire *de novo* into the defendant's claim to exemption from military service. Instead, the administrative determination is final and is subject to judicial inquiry only on jurisdictional grounds. Unless the defendant can establish that there is no factual basis in the administrative record for the classification or that in reaching its decision the board departed in a substantial respect from the selective service regulations, the classification is invulnerable. See *Eagles v. United States ex rel. Samuels*, 329 U. S. 304, 311-312, 316-317. In both cases here the excluded evidence consisted of proffered testimony as to petitioners' religious activities, evidence which was outside the administrative record in each case. Such evidence was not material to the issue whether there is basis in fact in the administrative record for the refusal of the boards to classify petitioners as ministers of religion, and it thus was properly excluded. See *Smith v. United States*, 157 F. 2d 176, 183-184 (C. C. A. 4), certiorari denied November 12, 1946, No. 534, this Term.

2. The decision in *Gibson v. United States*, 329 U. S. 338, demonstrates that petitioners were entitled to defend on the ground that the selec-

tive service boards exceeded their jurisdiction in refusing to classify them as ministers of religion. Petitioners did not claim in the trial court that they were denied any procedural rights by the boards. The sole question was whether there is basis in fact for the refusal of the boards to classify them as ministers. In each case the pertinent contents of petitioners' selective service files were received in evidence. The question is whether the court erred in instructing the jury that the classification was final.

In our view, the question whether there is some evidence to support the administrative determination is a pure question of law which called for a determination by the trial judge after examining the evidence in the selective service files. It is not an issue of fact for the jury. See *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 109-110; and see *Monongahela Bridge Co. v. United States*, 216 U. S. 177, where the record before this Court shows that the question whether there was evidence to support the administrative determination was decided by the trial judge and the jury was instructed that the order was lawful (No. 91, October Term, 1909). The difficulty in the present cases is that the trial judge did not pass on the question. Hence, there concededly was error in the trial court. We submit, however, that in the particular circumstances of these cases the error was harmless. See *Kottéakos v. United States*, 328 U. S. 750.

As we have pointed out, the trial court in each case received in evidence the pertinent contents of the defendant's selective service file. These exhibits, were before the circuit court of appeals and after examining them the court determined that there was substantial evidence to support the classifications. The exhibits are now before this Court. We think that they plainly demonstrate that there is ample evidence to support the refusal of the boards to classify petitioners as ministers.

Since the question is simply whether there is any evidence to support the boards' classifications, there are no issues of credibility or weight to be given to various items of evidence (see *Estep v. United States*, 327 U. S. 114, 122), upon which the trial court should pass first.¹ The question in these cases is whether viewing the evidence in the light most favorable to the Government there is any basis in fact for the classifications. The circuit court of appeals exercised its judgment on the question and has thus rendered harmless the circumstance that the trial judge did not do so first. Indeed, if petitioners

¹ Questions of credibility and the weight to be given to the various items of evidence in the selective service files are questions for decision only by the selective service boards as the trier of facts. See *Warehouse Co. v. United States*, 283 U. S. 501, 508; *Labor Board v. Nevada Copper Co.*, 316 U. S. 105; *Medo Corp. v. Labor Board*, 321 U. S. 678, 681-682; *United States ex rel. Phillips v. Downer*, 135 F. 2d 521, 525 (C. C. A. 2).

were to have a new trial or resort to habeas corpus to raise the question, the district court would be called upon to decide a question of law which already has been decided by the circuit court of appeals in the same cases and on the basis of the same selective service files upon which the district court would have to base its decision.

That the facts in the selective service files abundantly support the decision below that the local boards acted on the basis of evidence in refusing to classify petitioners as ministers is plain. On the facts before the local board it would have been less than difficult for the board to conclude that petitioner Cox's claim was asserted solely for the purpose of seeking a refuge from the draft. His evidence showed that his occupation is that of a truck driver and that he asserted a claim to exemption as a minister for the first time shortly after he was classified I-A in 1942, when the war was flagrant, and approximately a year and a half after he had registered for the draft. His claim is that he immediately became a minister in January 1942 when he joined the sect, and that by witnessing from house to house he was performing the functions of a minister. In our view, there is serious doubt concerning his bona fides which the board was entitled to resolve against him. In addition, he did not enjoy the status of a leader in the sect and his functions were no different from those

performed by any other members of the sect. Cox was a truck driver by occupation and at best a Jehovah's Witness by faith.

Similarly, petitioner Thompson's local board had before it evidence that for the thirteen years immediately preceding the draft Thompson was engaged in working in or operating a grocery store, except for a brief tour of duty in 1935 as an embalmer. He continued in this occupation during the war. He claimed he joined the sect in 1940, and the sect's records showed that he averaged about ten hours weekly in religious work during the period from October 1, 1942, through September 30, 1943, mostly in distributing books and magazines. Neither by training nor function was Thompson in any different status than the other members of the sect. He was not the shepherd; he was simply one member of the flock.

CONCLUSION

While a trial must be conducted in conformity with established principles of law—even if they are established after the trial has been completed—these are cases where the failure of the trial court to forecast the *Estep* and *Gibson* decisions did not in any sense prejudice petitioners. Their selective service files were received in evidence and the court below found that they contained substantial evidence in support of the classifications. As we have shown above, an independent examination of the files compels the

same conclusion. Since the files do not reasonably permit the conclusion that there was no evidence before the boards to support their refusal to classify petitioners as ministers and since there was no claim or proof of procedural irregularities in the administrative processes, we respectfully submit that the error of the trial court was harmless in each instance and that the petitions for writs of certiorari should therefore be denied.

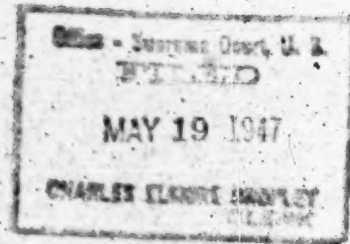
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MAY 1947.

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No. 1258

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In the Supreme Court of the United States

OCTOBER TERM, 1946

WILBUR ROISUM, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals
(R. 62-66) is reported at 157 F. 2d 787.

JURISDICTION

The judgment of the circuit court of appeals
was entered October 4, 1946 (R. 66-67), and a
petition for rehearing was denied March 20, 1947
(R. 67). The petition for a writ of certiorari
was filed April 17, 1947. The jurisdiction of this
Court is invoked under Section 240 (a) of the
Judicial Code, as amended by the Act of Feb-
ruary 13, 1925. See also Rules 37 (b) (2) and
45 (a) F. R. Crim. P.

QUESTION PRESENTED

✓ Whether in a prosecution for deserting a Civilian Public Service Camp the trial court committed reversible error in refusing to instruct the jury, as requested by petitioner, that the jury should return a verdict of not guilty if it found that petitioner's local board "erroneously" classified him.

STATUTE AND REGULATION INVOLVED

Section 5 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 305; provides, in part:

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

Section 622.44 of the Selective Service Regulations provided:

622.44 Class IV-D: Minister of religion or divinity student.—(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment

of the Selective Training and Service Act
(September 16, 1940).

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.
(6 F. R. 6610.)

STATEMENT

Petitioner registered under the Selective Training and Service Act with Local Board No. 1, Sunnyside, Washington, and in December 1941, he filed his selective service questionnaire. In that document he stated that he was twenty-two years old; that he had an eighth grade education; that for the past fifteen years he worked as a farmer; that he was ordained as a minister in the Jehovah's Witnesses sect in June 1940;¹ and that he desired classification in IV-D as a minister of religion.

Petitioner also filed a form letter from the Watchtower Bible and Tract Society which stated, *inter alia*, that he had been associated with the

¹ Petitioner stated in answer to one question that he had been an ordained minister for three years; in another answer he stated that he had been ordained in June 1940, approximately a year and a half before the questionnaire was filed.

sect since 1936; that he had been baptized in 1940; and that he devoted his "entire time" to his religious work. He also submitted an affidavit dated December 15, 1941, signed by his father which stated that petitioner was necessary to the operation of the father's farm.

He filed a conscientious objector's form on June 29, 1942, in which he claimed exemption from combatant and noncombatant military service. In this document he affirmed again that for the past fifteen years he had worked as a farmer. He stated also that he became a Jehovah's Witness in 1930, and that one Kenneth S. Hazen was his minister of religion.

Hazen informed the Selective Service System that the Sect's records of petitioner's religious activities showed that he worked the following number of hours in the months specified:

October	1942	28
November	1942	11
December	1942	47
January	1943	60
February	1943	60
March	1943	21

Hazen informed the board that "to my knowledge Wilbur Roisum has also conducted up to five studies a month, necessitating twenty calls a month." According to Hazen, petitioner held office in the local company of Jehovah's Witnesses

* Hazen informed the board that petitioner had suffered a leg injury in this month, the inference being that this accounts for the low number of hours worked.

as "Assistant Company Servant," "Back Call Servant" and "Book Study Conductor."

On June 25, 1942, the local board classified petitioner in I-A-O, as a conscientious objector to combatant military service. Petitioner immediately appealed to his board of Appeal. A hearing was held before a Department of Justice Hearing Officer, who filed a report recommending that petitioner's claim to exemption as a conscientious objector be sustained. Thereafter, on August 4, 1943, the board of appeal classified petitioner in IV-E, as a conscientious objector to all military service. Petitioner's subsequent request to the State Director that an appeal be taken to the President was rejected as not being necessary to avoid an injustice.

After several abortive attempts, petitioner, having been found physically acceptable for service, was ordered to report on May 23, 1944, to the local board for work of national importance. He reported and was transported to a Civilian Public Service Camp where he remained for five days. At his request, he was granted a weekend pass to leave camp and he never returned. (R. 35.)

On September 21, 1944, he was indicted (R. 2-3) in the United States District Court for the District of Oregon in one count charging that he deserted from the Civilian Public Service Camp, in violation of Section 11 of the Selective Training and Service Act. At petitioner's trial, the

Government established through the testimony of the local board clerk and the camp director that petitioner was finally classified IV-E, that he reported to a Civilian Public Service Camp, and that he deserted the camp. At petitioner's instance the entire selective service file was received in evidence as an exhibit offered by the Court (R. 27.)

Petitioner was the sole witness for the defense. He testified, *inter alia*, that he had desired classification in IV-D as a minister, not IV-E (R. 37). He related the various events before the Selective Service Boards and explained that he had reported to camp only to be in a position to challenge his classification by a habeas corpus proceeding, but he left camp without having resorted to habeas corpus (R. 36-42).

Petitioner offered no other evidence. None of his evidence was excluded by the court.³ He made no motion for a directed verdict either at the close of the Government's case or at the close of all the testimony. The court refused a request to charge the jury that a verdict of not guilty should be returned if the jury found that the local board "erroneously classified defendant in class IV-E" (R. 50). Instead, the jury was instructed that

³ Petitioner states (Pet. 6) that *de novo* testimony as to his ministerial activities was excluded by the court, but he cites no record references and we find nothing in the record to support the statement.

the board's classification was conclusive (R. 45). The jury returned a verdict of guilty (R. 4-5).

Thereafter a motion was filed on behalf of petitioner for a judgment of acquittal or for a new trial (R. 49). It was considered together with a similar motion of another defendant. The court granted the motion as to the other defendant because "I find no ground for the action of the Draft Board in classifying a man as a conscientious objector when he has not claimed it." The motion was denied as to petitioner because after carefully examining petitioner's selective service file the court determined that there was no invalidity in the classification and thus the motion had "no ground to support" it. (R. 50-51.) Petitioner was sentenced to imprisonment for two years (R. 5-6).

Upon appeal to the circuit court of appeals, the case was considered with two other cases (*Cox v. United States* and *Thompson v. United States*, Nos. 1256 and 1257, this Term), which also involved convictions for deserting from a Civilian Public Service Camp. In its first opinion, the circuit court of appeals reversed the judgments on the theory that the *Estep* decision controlled and that the defendants were entitled to have the jury pass on their ministerial claims (see Pef. 13-14). The Government's petition for rehearing informed the court that *Gibson v. United States*, 329 U. S. 338, was then pending in this Court for reargument and that the *Estep* de-

cision thus was not controlling. We further argued that the *Estep* decision permitted a judicial inquiry only into the jurisdiction of the local board and not into the correctness of the classification. The petition was granted, and upon reconsideration by the court, the judgments were affirmed because in each case there was substantial evidence to support the board's classification (R. 59-66).

ARGUMENT

None of the evidence which petitioner tendered in the trial court was rejected. The sole basis of petitioner's complaint is that the court refused the following requested instruction (R. 50):

The Court hereby instructs you that if you find that Local Board #1, Yakima County, Sunnyside, Wash. erroneously classified defendant in Class IV-E, that their order issued to defendant to report to the C. P. S. Camp was void and your verdict should be "not guilty."

The *Estep* decision, 327 U. S. 114, 122, makes plain that the court did not err in refusing this instruction. For as the Court there said, "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." The *Estep* decision and the decision in *Gibson v. United States*, 329 U. S. 338, entitled petitioner to defend on the ground that "there is no basis in fact for the classification" or that the classification was not made in

conformity with the applicable selective service regulations. But petitioner offered no such defense in the district court. His sole claim, as the requested instruction to the jury illustrates, was that his classification was erroneous, a contention which was not a valid defense. It was not error for the district court to refuse the requested instruction, for it did not correctly state the law.

For the first time on motion for judgment of acquittal notwithstanding the verdict of the jury or in the alternative for a new trial, petitioner asserted the claim that his classification was the result of "arbitrary, capricious and unlawful conduct" by the classifying board (see R. 12-13). At this juncture, the trial judge examined petitioner's selective service file which was in evidence, and thereafter the motion was denied because the court concluded that the classification was not unlawful (R. 51). The fact that in a companion case the court granted a motion for judgment of acquittal because "I find no ground for the action of the Draft Board" (R. 51) suggests the nature of the court's approach to petitioner's motion.

The circuit court of appeals also had the selective service file before it, and the court concluded that there was substantial evidence in the file to support the classification (see R. 63-66).

We agree with both courts below that there was abundant evidence before the selective service boards which justified their refusal to classify

petitioner as a minister. The evidence before the boards, which we have summarized in the statement, *supra*, pp. 3-5, shows that petitioner was a boy of twenty-two who since early childhood had worked as a farm hand on his father's farm. He described his occupation as that of a farm hand for the past 15 years. His father informed the board that he was essential to the farm. His religion was that of the Jehovah's Witnesses. He recognized the local leader of the sect, Kenneth S. Hazen, as his minister of religion. For his participation in the activities of the sect, petitioner "witnessed" for varying periods of time, depending upon how much time he could spare from his farm work. The records of the sect showed that he devoted as little as 11 hours to Jehovah's Witness activities in the month of November 1942, and that the most time he devoted to these activities was 69 hours for the entire month of February 1943. There is no evidence that petitioner's status in the sect was any different from that of any other member of the sect. He was not the leader of the local unit; he was merely a member who in his spare time practiced his religion by witnessing. Without repeating the arguments which were made to the Court in the *Kulick* (No. 840, this Term) and *Sunal* (No. 535, this Term) cases, we think it plain that, unless it can be said that all Jehovah's Witnesses are ministers within the meaning of the Selective Training and Service Act, it cannot

he contended that there is no basis in fact for the board's refusal to classify petitioner as a minister of religion. Accordingly, we submit that both courts below correctly held that the induction order is valid and that petitioner has been properly convicted for deserting from the Civilian Public Service Camp to which he had reported.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.

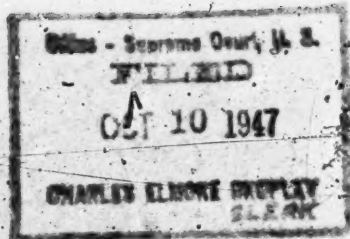
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Attorneys.

MAY 1947.

¹ *Poole v. United States*, 159 F. 2d 312 (C. C. A. 4), relied upon by petitioner as being in conflict with the decision below (see Pet. 11), held that a member of a Civilian Public Service Camp who was prosecuted for deserting the camp was entitled to defend on the ground that the local board exceeded its jurisdiction and that it was error for the trial court to exclude evidence as to this issue. The case is unlike petitioner's case, for here all of petitioner's proffered evidence was received by the trial court and both courts below determined that the local board did not exceed its jurisdiction.

FILE COPY



Nos. 66, 67, and 68

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**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 66

WESLEY WILLIAM COX, PETITIONER

v.

UNITED STATES OF AMERICA

No. 67

THEODORE ROMAINE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 68

WILBUR ROISUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (No. 66, R. 57-61; No. 67, R. 60-64; No. 68, R. 62-66) is reported at 157 F.2d 787.

(1)

JURISDICTION

The judgments of the circuit court of appeals were entered October 4, 1946 (No. 66, R. 61-62; No. 67, R. 64-65; No. 68, R. 66-67) and a petition for rehearing was denied March 20, 1947 (No. 66, R. 73; No. 67, R. 65; No. 68, R. 67). The petitions for writs of certiorari were filed April 17, 1947, and were granted June 9, 1947, the cases being consolidated for argument (No. 66, R. 75; No. 67, R. 67; No. 68, R. 69). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. In a prosecution for deserting from a Civilian Public Service Camp is the question whether there is any basis in fact for the selective service classification one for determination by the trial judge or by the jury?

2. If the question is one for the trial judge, whether the failure of the trial judge to pass on the question in the *Cox* and *Thompson* cases is reversible error in view of the fact that the circuit court of appeals did examine the selective service files which were in evidence and determined that there was ample factual basis for the classifications.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 and the Selec-

tive Service Regulations and Opinion 14 of the Director of Selective Service are set forth in the Appendix, *infra*, pp. 51-57.

STATEMENT

A. THE PROCEEDINGS BEFORE THE SELECTIVE SERVICE BOARDS AND IN THE DISTRICT COURTS

1. No. 66, *Cox*.—Petitioner's selective service file shows that he registered under the Selective Training and Service Act on October 16, 1940, with Local Board No. 2, Jackson County, Oregon (R. 8). He filed his questionnaire (Pl. Ex. No. 2, R. 9) on December 4, 1940. He stated that he was 22 years old; that since 1936 he had been employed as a truck driver hauling lumber and logs; and that he was engaged in no other business or work. He did not claim exemption from service as a minister or as a conscientious objector.

On December 4, 1940, the local board classified petitioner in Class I, subject to physical examination, and on January 31, 1941, he was classified IV-F—not physically fit for service. The classification was changed to I-A on March 10, 1942. Ten days later, on March 20, 1942, petitioner for the first time claimed exemption from military service. He filed the form provided for registrants asserting conscientious objections to military service (Pl. Ex. No. 3, R. 9).

In this document petitioner stated that he joined the Jehovah's Witnesses sect in January 1942 and began witnessing from house to house

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and on street corners; that his occupation was "logging and lumbering"; and that his minister was one Elmer Halbert, the leader of the local unit of Jehovah's Witnesses.

The local board on April 3, 1942 rejected petitioner's claim to exemption, but on May 25, 1942, he was again classified in IV-F, as one physically unfit for military service.¹ On June 12, 1942, the local board reclassified petitioner in IV-E, as a conscientious objector to military service. In response to this classification, petitioner wrote the local board on June 22, 1942, requesting for the first time that he be classified as a minister of religion (R. 12; Def. Ex. No. 7, R. 12). On June 26, 1942, the local board determined that petitioner was properly classified IV-E. On the same date petitioner took an appeal to his board of appeal.

Petitioner informed the board that on October 16, 1942, he became a "pioneer" in the sect and undertook to devote 150 hours monthly to religious work. An affidavit from his minister was filed stating that petitioner had been in the sect since January 1942 and that he was serving as a minister. He also filed a statement from the Watchtower Bible and Tract Society to the same effect. (R. 12-15.) On December 7, 1942, the board of appeal also classified him in IV-E.

Petitioner requested the local board to reconsider the classification (Def. Ex. 10, R. 12), but

¹ A summary of the local board action is contained on the last page of the selective service questionnaire (Pl. Ex. No. 2).

on December 21, 1942, the board refused to do so. On May 18, 1944, the local board ordered petitioner to report for work of national importance. He reported on May 26 (R. 10, 16) to the Civilian Public Service Camp to which he was assigned "solely for the purpose of completing the administrative process" (R. 18) and he then left the camp (R. 22).

Thereafter on October 17, 1944, petitioner was indicted (R. 2-3) in the United States District Court for the District of Idaho for having deserted from the camp, in violation of Section 11 of the Selective Training and Service Act. At his trial, the Government's evidence established that petitioner was finally classified IV-E, and that he reported to the Civilian Public Service Camp to which he was assigned and then left the camp without permission (R. 8-10, 15-17).² The contents of petitioner's selective service file was received in evidence as exhibits (R. 8-12). For his defense petitioner testified that he sought classification as a minister and that he deserted the Civilian Public Service Camp to which he reported because he was not so classified (R. 20-22); and he testified *de novo* as to his duties as a minister (R. 21). His wife testified that peti-

² Petitioner's motion for a directed verdict at the close of the Government's case on the ground that "it is not shown that the Government has considered any evidence showing anything to the contrary to the defendant's contention that he is a minister of the gospel" was denied (R. 19).

tioner was recognized by the sect as a minister, but the testimony was stricken from the record on motion of the Government (R. 23). Petitioner adduced no other evidence.

Over petitioner's objection (R. 28), the court instructed the jury not to concern itself with the action of the selective service boards (R. 26-27). Petitioner was convicted (R. 4) and sentenced to imprisonment for a term of three years and three months and to pay a fine of \$300 (R. 4-5).

2. No. 67, *Thompson*.—On October 16, 1940, petitioner registered with Local Board No. 1, Jackson County, Oregon (Pl. Ex. No. 1, R. 9). In his selective service questionnaire (Pl. Ex. No. 2, R. 10), which was executed May 27, 1941, petitioner stated that for the past 13 years his occupation was that of operating a grocery store and that, in addition, he had been a minister in the Jehovah's Witnesses sect since August 1, 1940. In the conscientious objector's form (Pl. Ex. No. 3, R. 10) which he filed at the same time, petitioner stated that he became a member of the sect in August 1940; that after completing high school in 1928 he worked as a grocery clerk and manager until 1935, as an embalmer in 1935, and as a grocery manager and owner thereafter; and that one Fred Kimmet, the local leader of the Jehovah's Witnesses, was his minister of religion.

On May 28, 1941, the local board classified petitioner in III-A, a deferred classification be-

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cause of dependents. When the dependency deferment was no longer available to persons in petitioner's situation he was classified IV-E, as a conscientious objector to military service.

On November 5, 1943, petitioner took an appeal to his board of appeal and he adduced additional evidence in support of his claim to exemption. He filed a statement signed by various members of the sect, including Kimmet, the local leader, stating that they recognized him as a minister, and an affidavit by Kimmet, stating that petitioner's record of "field service" for the year ending September 30, 1943, showed that petitioner devoted 519½ hours in which he disposed of 46 bound books, 625 booklets and 673 magazines, and during which he made 105 "back calls" and 316 "sound attendance." Similar supporting documents corroborating petitioner's claim were also filed (see R. 14-17).

On December 29, 1943, the board of appeal by vote of 5 to 0 classified petitioner in IV-E. An order to report for work of national importance was sent to petitioner (Pl. Ex. No. 5, R. 11) and he complied with it by reporting on April 18, 1944 to the Civilian Public Service Camp to which he was assigned. After reporting to the camp, petitioner promptly handed to the camp director a letter stating that he believed himself to be wrongly classified and that he would not remain at the camp (R. 21-22). Within fifteen

or twenty minutes after reporting petitioner left the camp and did not return (R. 27).

On October 17, 1944, petitioner was indicted (R. 2-3) in the United States District Court for the District of Idaho in one count charging that he departed from the camp without authority, in violation of Section 11 of the Selective Training and Service Act. His trial followed the same pattern as the trial in the *Cox* case *supra*. The Government's proof established that petitioner was finally classified IV-E, that he reported to the camp in compliance with the board's order and that he then left the camp without authority (R. 8-11, 18-20). The pertinent contents of petitioner's selective service file were admitted in evidence (see R. 9, 10, 11, 14, 16).³

For his defense, petitioner testified briefly concerning his claim to exemption as a minister (R. 24-27). On the Government's objection, he was not permitted to testify *de novo* concerning his asserted duties as a minister (R. 25). The only other defense witness was a member of the sect who testified that she recognized petitioner as a minister (R. 28).

As in the *Cox* case, the court instructed the jury that it should not concern itself with the

³ As in the *Cox* case, *supra*, p. 5, petitioner's motion at the close of the Government's case for a directed verdict on the ground that the prosecution had not adduced any evidence showing that petitioner is not a minister was denied (R. 23-24), and a similar motion at the close of the defendant's was likewise denied (R. 28).

selective service classification (R. 32) and the jury thereafter returned a verdict of guilty (R. 4). Petitioner was sentenced to imprisonment for a term of three years and three months and to pay a fine of \$300 (R. 4-5).

3. No. 68, *Roisum*.—Petitioner registered under the Selective Training and Service Act with Local Board No. 1, Sunnyside, Washington, and in December 1941, he filed his selective service questionnaire. In that document he stated that he was twenty-two years old; that he had an eighth grade education; that for the past fifteen years he worked as a farmer; that he was ordained as a minister in the Jehovah's Witnesses sect in June 1940; and that he desired classification in IV-D as a minister of religion.

Petitioner also filed a form letter from the Watchtower Bible and Tract Society which stated, *inter alia*, that he had been associated with the sect since 1936; that he had been baptized in 1940; and that he devoted his "entire time" to his religious work. He also submitted an affidavit dated December 15, 1941, signed by his father which stated that petitioner was necessary to the operation of the father's farm.

He filed a conscientious objector's form on June 29, 1942, in which he claimed exemption from com-

* Petitioner stated in answer to one question that he had been an ordained minister for three years; in another answer he stated that he had been ordained in June 1940, approximately a year and a half before the questionnaire was filed.

batant and noncombatant military service. In this document he affirmed again that for the past fifteen years he had worked as a farmer. He stated also that he became a Jehovah's Witness in 1930, and that one Kenneth S. Hazen was his minister of religion.

Hazen informed the Selective Service System that the Sect's records of petitioner's religious activities showed that he worked the following number of hours in the months specified:

October 1942	28
November 1942	11
December 1942	47
January 1943	60
February 1943	60
March 1943 ^a	21

Hazen informed the board that "to my knowledge Wilbur Roisum has also conducted up to five studies a month, necessitating twenty calls a month." According to Hazen, petitioner held office in the local company of Jehovah's Witnesses as "Assistant Company Servant," "Back Call Servant" and "Book Study Conductor."

On June 25, 1942, the local board classified petitioner in I-A-O, as a conscientious objector to combatant military service. Petitioner immediately appealed to his board of appeal. A hearing was held before a Department of Justice Hearing Officer, who filed a report recommending that petitioner's claim to exemption as a conscientious

^a Hazen informed the board that petitioner had suffered a leg injury in this month, the inference being that this accounts for the low number of hours worked.

objector be sustained. Thereafter, on August 4, 1943, the board of appeal classified petitioner in IV-E, as a conscientious objector to all military service. Petitioner's subsequent request to the State Director that an appeal be taken to the President was rejected as not being necessary to avoid an injustice.

After several abortive attempts, petitioner, having been found physically acceptable for service, was ordered to report on May 23, 1944, to the local board for work of national importance. He reported and was transported to Civilian Public Service Camp where he remained for five days. At his request, he was granted a weekend pass to leave camp and he never returned. (R. 35.)

On September 21, 1944, he was indicted (R. 2-3) in the United States District Court for the District of Oregon in one count charging that he deserted from the Civilian Public Service Camp, in violation of Section 11 of the Selective Training and Service Act. At petitioner's trial, the Government established through the testimony of the local board clerk and the camp director that petitioner was finally classified IV-E, that he reported to a Civilian Public Service Camp, and that he deserted the camp. At petitioner's instance the entire selective service file was received in evidence as an exhibit offered by the Court (R. 27, 29).

Petitioner was the sole witness for the defense. He testified, *inter alia*, that he had desired classifi-

cation in IV-D as a minister, not IV-E (R. 37). He related the various events before the Selective Service Boards and explained that he had reported to camp only to be in a position to challenge his classification by a habeas corpus proceeding, but he left camp without having resorted to habeas corpus (R. 36-42).

Petitioner offered no other evidence. None of his evidence was excluded by the court. He made no motion for a directed verdict either at the close of the Government's case or at the close of all the testimony. The court refused a request to charge the jury that a verdict of not guilty should be returned if the jury found that the local board "erroneously classified defendant in class IV-E" (R. 50). Instead, the jury was instructed that the board's classification was conclusive (R. 45). The jury returned a verdict of guilty (R. 4-5).

Thereafter a motion was filed on behalf of petitioner for a judgment of acquittal or for a new trial (R. 49). It was considered together with a similar motion of another defendant. The court granted the motion as to the other defendant because "I find no ground for the action of the Draft Board in classifying a man as a conscientious objector when he has not claimed it." The motion was denied as to petitioner because after carefully examining petitioner's selective service file the court determined that there was no invalidity in the classification and thus the motion

had "no ground to support" it. (R. 50-51.)
 Petitioner was sentenced to imprisonment for two
 years (R. 5-6).

B. THE PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

Two opinions were written by the circuit court of appeals. The first opinion, filed April 5, 1946, was withdrawn on September 27, 1946, and the causes were resubmitted to the court for further consideration. On October 4, 1946 the present opinion of the court was filed.

In its original opinion the circuit court of appeals concluded that the decision in *Estep v. United States*, 327 U. S. 114, required that the causes be remanded to the district courts for new trials because "It logically follows in the instant cases that by taking from the jury the consideration of competent and substantial evidence upon the registrants' claims, that they were in fact ministers, the courts deprived the appellants of a valid defense to the charges for which they were being tried." (See No. 66, Pet. 18). A petition for rehearing, filed by the Government, informed the court that the question which the circuit court of appeals held was determined by the *Estep* decision was before this Court in *Gibson v. United States*, 329 U. S. 338, which at that time had been restored to the docket for reargument before a full bench. In addition, it was urged on the petition for rehearing that the court erred in

concluding that where a defendant is entitled to challenge his classification in a criminal proceeding, it is a question for the jury to determine whether the defendant is a minister. Petitioners filed a brief opposing the petition for rehearing, and the circuit court of appeals thereafter withdrew its original opinion and ordered the cause resubmitted to the court on the basis of the original oral argument and briefs and the briefs filed on the motion for a rehearing (No. 66, R. 54; No. 67, R. 57-58; No. 68, R. 59-60).

In its second opinion the circuit court of appeals recognized that the petitioners were not entitled to a trial *de novo* on the issue of their classification, and that, "since in each case under treatment in this opinion the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board, the court was not in error in instructing the jury to disregard it entirely." (No. 66, R. 60; No. 67, R. 62-63; No. 68, R. 64-65). Accordingly, in each case the judgment of conviction was affirmed (No. 66, R. 61-62; No. 67, R. 64-65; No. 68, R. 66-67).

SUMMARY OF ARGUMENT

1. In all three cases, the trial courts withheld from the jury the question whether the selective service boards exceeded their jurisdiction in refusing to classify petitioners as ministers of religion. We submit that the courts properly

did so because the question whether there is basis in the administrative record for the classification which the boards made is a question of law for the trial judge, and it was not intended by Congress that a jury in a criminal trial should judicially review a finding of fact by a selective service board.

The decision in *Yakus v. United States*, 321 U. S. 414, makes it plain that a defendant in a criminal case has no constitutional right to have the jury decide whether the administrative order is valid. *Estep v. United States*, 327 U. S. 114, recognized that the function of finding the facts was lodged in the selective service boards and that their determinations were made final. The *Estep* case reserved for judicial review only the jurisdictional questions whether the board acted in conformity with the regulations and whether there was some basis in fact for the classification which the board gave the registrant. The only question presented in these cases is the latter one. Decision of that question requires that the selective service file be examined to determine whether there was any evidence before the board to support its finding. Issues of credibility and of the weight to be given the various items of evidence are solely for the trier of fact and may not be considered on judicial review. Thus all that is before the court is a question as to the legal effect

of the evidence, and that is a question of law for the trial judge.

The function of the court in this respect is no different from its function when it reviews a verdict of a jury to determine whether there is sufficient evidence to support it. This Court long has justified judicial examination of an administrative record to determine whether there is warrant in the record for the administrative finding on the theory that this is a question of law. For "A finding without evidence is beyond the power" of the agency and an order based on such a finding is "contrary to law." *I. C. C. v. Louisville & Nashville R. R.*, 227 U. S. 88, 92; Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 74-75. Congress, too, has consistently regarded the question whether there is "some," "any" or "substantial" evidence to support the administrative determination as a question of law. As we show in the Argument, Congress in providing statutory methods of judicial review has lodged the power to decide such questions in judges; it has never made the issue one for the jury.

In our view, the registrant's situation is the same whether he obtains judicial review in a habeas corpus proceeding or whether he challenges the jurisdiction of the local board as a defense in his criminal trial for having violated

the order. He is entitled to a determination by the court as to the legality of the order; he has no right to have the jury judicially review the administrative finding of fact or to substitute its judgment for that of the local board.

2. In petitioner Roisum's trial, the trial judge properly instructed the jury that the selective service classification was final, and he correctly decided that there is basis in fact for the refusal of the selective service board to classify him as a minister. The facts shown by petitioner's selective service file, which is summarized in the Statement, *supra*, pp. 9-11, require the conclusion that petitioner was a farmer by occupation. Indeed, his occupational deferment was sought on that basis. His religious faith was that of the Jehovah's Witnesses. By his own evidence, it was established that the average time devoted by him to religious activities did not exceed one hour and twenty minutes a day. There was no evidence that petitioner was the religious leader of the local unit of Jehovah's Witnesses. He was merely a member of the society who, in his free time, engaged in the religious activities of the group.

3. In the *Cox* and *Thompson* cases, the trial judge neglected to pass on the question which was before him as to the sufficiency of the evidence in the selective service files to support the selective service classifications. This was error, but it was cured by the fact that the circuit court of appeals

did perform this function. Since the question was one of law, the verdict of the jury in each case quite plainly was not influenced by the error of the trial court, and the appellate court was at least as capable as the trial court of deciding the question. Particularly in view of the compelling evidence in the files in support of the classifications, there is no possibility that petitioners were harmed by the error of the trial court. See *Kotteakos v. United States*, 328 U. S. 750.

The evidence in the selective service file of petitioner Cox showed that his occupation was that of a truck driver and that he first asserted a claim to a ministerial exemption after he was classified I-A and approximately a year and a half after he had registered for the draft. His claim was that he joined the Jehovah's Witnesses in January 1942 and immediately became a minister of religion. But he performed none of the functions usually associated with the ministry, and his status in the society was no different from that of the other members. The selective service board easily could have concluded that he joined the society for the purpose of seeking a refuge from the draft and, in any event, that he was not in fact functioning as a minister of religion.

Similarly, petitioner Thompson's local board had before it evidence that for the thirteen years immediately preceding the draft Thompson was engaged in working in or operating a grocery store, except for a brief tour of duty in 1935 as

an embalmer. He continued in this occupation during the war. He claimed he joined the sect in 1940, and the sect's records showed that he averaged about ten hours weekly in religious work during the period from October 1, 1942, through September 30, 1943, mostly in distributing books and magazines. Neither by training nor function was Thompson in any different status than the other members of the sect. He was not the shepherd; he was simply one member of the flock.

ARGUMENT

In each case the defendant's selective service file was received in evidence, but the jury was instructed that the selective service classification was final and not open to review by the jury and that each of the defendants should be convicted if the jury found that he knowingly failed to remain at the Civilian Public Service Camp to which he reported. Thus, the decisive issue presented by the cases is whether in a prosecution under Section 11 of the Selective Training and Service Act of 1940 the defense that the local board exceeded its jurisdiction because there is no basis in fact for its classification is a question for determination by the trial judge or by the jury. If, as we believe, the question of jurisdiction is a question of law for the trial judge, the decisions below should be affirmed. For, as we shall show, the trial judge passed on the question in the *Roisum* case, No. 68, and properly held

that the local board had acted within its jurisdiction. In the *Cox* and *Thompson* cases, Nos. 66 and 67, it does not appear from the record that the trial judge ever formally determined whether there is basis in fact for the defendants' classifications. This was error. But of all types of harmless error, this was the most harmless. For the three judges of the circuit court of appeals examined the selective service files, which were before the court as exhibits, and concluded that there was substantial evidence in support of the classifications of the boards. Since, as we shall show, there were no issues of credibility or of the weight to be given to the various items in the selective service file, the appellate court was at least as capable as the trial judge of passing on the jurisdictional question, and its action thus cured the error of the trial judge.

I

THE QUESTION WHETHER THERE IS ANY BASIS IN FACT FOR A SELECTIVE SERVICE CLASSIFICATION IS A QUESTION OF LAW FOR THE TRIAL JUDGE. CONGRESS DID NOT INTEND THAT A JURY IN A CRIMINAL TRIAL SHOULD JUDICIALLY REVIEW AN ADMINISTRATIVE FINDING OF FACT.

A. *The Constitution.*—*Yakus v. United States*, 321 U. S. 414, specifically decided that the constitutional protections which a defendant in a criminal trial enjoys do not require that in a prosecution for violation of an administrative order the defendant shall be entitled to have the

jury decide whether the order is valid. The facts in that case follow the same pattern as the facts in the present cases.⁶ Yakus was indicted for the wilful violation of a price order and in his criminal trial he attempted to show that the order did not conform to the standards prescribed in the Emergency Price Control Act, and that it deprived him of property without the due process of law guaranteed by the Fifth Amendment. He had not attempted to test the validity of the order by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. 321 U. S. at 419.

This Court held that the statutory procedure for review of the order—by protest to the Administrator and, if necessary, application to the Emergency Court of Appeals—was the exclusive road to review of the Price Administrator's order, and the exclusion of the proffered evidence in the criminal trial was upheld. In sustaining the statutory review procedure, the Court said (321 U. S. at 444):

Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see *Douglas v. City of Jeannette*, 319 U. S. 157, 163, the present statute provides a mode of testing the validity of a regula-

⁶ In the present cases, however, the evidence relevant to the defense asserted by petitioners was received at the trials.

tion by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in *Bradley v. Richmond*, *supra* [227 U. S. 477], and in *Wadley Southern Ry. Co. v. Georgia*, *supra*, [235 U. S. 651] 667, 669, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

The Court specifically rejected the argument that the Sixth Amendment required that the jury in the criminal trial should have been permitted to consider the defense that the Price Administrator's order was in excess of his

authority. The court said (321 U. S. at 447-448):

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Cf. *Block v. Hirsh, supra*, [256 U. S. 135] 158. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury. Cf. *Falbo v. United States, supra*.

For the purposes of the present cases, the significant feature of the decision is the square holding that at least so long as a defendant in a criminal court is afforded an adequate opportunity to obtain judicial review of the adminis-

¹ See Quill, *Judicial Review and the Price Control Act*, 24 Boston Univ. L. Rev. 250, 258.

trative order for whose violation he is prosecuted, he does not have a constitutional right to have the jury in the criminal trial consider the question of the validity of the administrative order.

The situation in the *Yakus* case differs from that in petitioners' cases in one respect. Unlike the Emergency Price Control Act, the Selective Training and Service Act does not provide in specific terms for a statutory method of judicial review. Nevertheless, this Court has held that Congress intended a limited judicial review, and that such review may be obtained in the criminal trial for violation of the administrative order, provided that the defendant has exhausted his administrative remedies. *Estep v. United States*, 327 U. S. 114. But this does not mean that the issue is one for the jury. If, as we believe, the question of the jurisdiction of the local board to issue the order presents a question of law for the trial judge, the defendant obtains the kind of judicial review which was approved in the *Yakus* case, and which customarily obtains in assessing the legality of an administrative order, without encountering the problem of piecemeal litigation which disturbed some members of the Court in the *Yakus* case. See 321 U. S. at pp. 478-481.

It, of course, is not a novel constitutional doctrine to urge, as we do, that the Constitution does not require that every issue in a criminal trial shall be submitted to the jury. For the settled function of the jury is to determine issues of fact;

the power to decide issues of law is for the trial judge. *Dimick v. Schiedt*, 293 U. S. 474, 486; *Patton v. United States*, 281 U. S. 276, 288; *Sparf and Hansen v. United States*, 156 U. S. 51. Thus, for example, this Court has held that if there is an issue as to the existence of probable cause for the issuance of a search warrant, the question is solely for the trial judge and may not be considered by the jury. *Steele v. United States No. 2*, 267 U. S. 505, 511. Similarly, where the question of the legality of a seizure of a ship and its cargo of liquor was presented, this Court held that the issue was for the court and not the jury because it was a question bearing on the admissibility of evidence at the trial. *Ford v. United States*, 273 U. S. 593, 605.

We submit, that unless Congress authorized reconsideration in the criminal trial of issues of fact decided by the selective service boards, there is no jury issue in the criminal trial in respect of the validity of the selective service classification. The question is solely one of determining what Congress intended. And it is to that problem that we now turn.

B. The *Estep* decision.—There no longer is any occasion to speculate as to the congressional intent in respect of the question of judicial review of selective service classifications. The decision in *Estep v. United States*, 327 U. S. 114, resolved that disputed question. This Court there recognized that the function of finding the facts with

respect to a registrant's claim to exemption or deferment from military service was lodged in the local boards and that their decisions were made final, except where an administrative appeal was permitted. "Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies." 327 U. S. at 119.

The Court was unwilling to believe that Congress intended the courts to enforce the criminal sanctions of the Act "where a local board acts so contrary to its granted authority as to exceed its jurisdiction" (327 U. S. at 120). For this reason, it was concluded that Congress intended the finality provision of Section 10 (a) (2) of the Act to apply only to an order which was within the jurisdiction of the board, and that a defendant, who had exhausted his administrative remedies, could challenge the legality of the order in his criminal trial. Fortunately, the Court did not leave in doubt what the scope of judicial review was to be. Speaking for the Court, Mr. Justice Douglas said (327 U. S. at 122-123):

The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards

was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

The quoted language is the language of limited judicial review, not of a trial *de novo*, as petitioners urge. As the Court said, not even the ordinary scope of judicial review under other administrative statutes applies here. The issue in the criminal trial is whether the local board acted within the bounds of its authority; it is not whether the registrant is a minister of religion.*

* Compare *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195, where this Court rejected the contention that in a criminal prosecution for violation of an order of the Secretary of War the jury should have been permitted to pass on the factual issue previously determined by the Secretary. The Court said:

"It does not appear that the Secretary disregarded the facts, or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be deter-

A decision of the board made in conformity with the selective service regulations is final, and the courts may not interfere even though they might weigh the evidence differently, or even though they believe the decision to be erroneous. Where, as in these cases, there has been procedural regularity, the narrow function of the court is to determine whether "there is no basis in fact for the classification." 327 U. S. at 122-123.

The nature of the inquiry requires that this question be determined on the basis of the evidence before the local board. *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, 185; *National Broadcasting Co. v. United States*, 319 U. S. 190, 227. For evidence not adduced before the board, although there was opportunity to do so, has no probative value in showing that the board made its decision on a basis other than the evidence before it. To allow the board's classification to be attacked in court by new evidence would substitute the court for the board as the classifying body. *Tagg Bros. v. United States*, 280 U. S. 420, 443-444. Thus, if there is a basis in the evidence before the board for its finding, the classification must be sustained.

If this issue were presented in a habeas corpus proceeding, as in *Eagles v. United States ex rel.*

mined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress. * * *

Samuels, 329 U. S. 304, it, of course, would be decided by the trial judge. In our view, the same thing occurs in the criminal trial. For the question is one of law. There is nothing in the issue in respect of which the jury could function. The facts already have been found by the trier of fact. There are no issues of credibility, and there are no questions concerning the weight to be given various items of evidence. All that is before the court is a question as to the legal effect of the evidence contained in the selective service file. See *Sunal v. Large*, 157 F. 2d 165, 173 (C. C. A. 4), affirmed June 23, 1947, No. 535, Oct. T. 1946. And this is as much a question for the trial judge as is the question, on motion for judgment of acquittal or for a new trial, whether there is sufficient evidence to support the jury's verdict.⁹ In both situations the trial judge determines only whether, viewing the evidence in the light most favorable to the Government, there is sufficient evidence to support the finding of the trier of the facts. See *Estep v. United States*, *supra*, at 144-145 (concurring opinion); see also, *N. L. R. B. v. Columbian Co.*, 306 U. S. 292, 300.

In dealing with the judicial review of administrative determinations this Court long has recog-

⁹ "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court." *Baltimore & C. Line v. Redman*, 295 U. S. 654, 659. "To the same effect, *Kotteckos v. United States*, 328 U. S. 750, 764, fn. 18; cf. *Galloway v. United States*, 319 U. S. 372, 390.

nized that it may examine an administrative record to determine whether there is "substantial," or "some," or "any" evidence, as the case may be, to support the administrative finding. And in doing so, whether or not pursuant to specific statutory authorization, the Court always has purported to be examining a question of law.¹⁰ The theory has been that "A finding without evidence is beyond the power" of the agency and an order based on such a finding is "contrary to law."¹¹

I. C. C. v. Louisville & Nashville R. R., 227 U. S. 88, 92. See, e. g., *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 109; *Crowell v. Benson*, 285 U. S. 22, 48, 49-50; *I. C. C. v. Union Pacific R. R.*, 222 U. S. 541, 547; *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 276, 277; *R. F. C.*

¹⁰ Thus, even where the review authorized by Congress is limited to questions of law, the court has said that the question whether the administrative finding has "warrant in the record" is open to judicial inquiry. *Dobson v. Commissioner*, 320 U. S. 489, 497, 501.

¹¹ The Report of the Attorney General's Committee on Administrative Procedure (p. 88) summarized the situation as follows:

"In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, it is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence. The question whether the administrative finding of fact rests on substantial evidence, it is said, is really a question of law, for a finding not so supported is arbitrary, capricious and obviously unauthorized."

v. *Bankers Trust Co.*, 318 U. S. 163, 170; *Dobson v. Commissioner*, 320 U. S. 489, 497, 501; *Yakus v. United States*, 321 U. S. 414, 437; and see, particularly, Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70.

Congress, too, in establishing statutory procedures for judicial review of administrative determinations has recognized that the judicial function involves an inquiry into a question of law¹² and, at least implicitly, that the task is not one for a jury. Thus, in the many statutory provisions, judicial review procedures have been established for review in a district court,¹³ in a circuit court of appeals¹⁴ or in a special tribunal.¹⁵ But so far as we have been able to ascertain, Congress never has directed that an administrative deter-

¹² Thus, for example, Section 3 of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752 (28 U. S. C. 288), provides in respect of review by this Court of determinations of the court of claims:

"In such cases the Supreme Court shall have authority to review, *in addition to other questions of law*, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; * * *." [Italics added.]

¹³ See, e. g., the Railroad Unemployment Insurance Act of 1938, 45 U. S. C. 355 (f) and (g); the Urgent Deficiencies Act, 28 U. S. C. 43-48; The Federal Food, Drug and Cosmetic Act, 21 U. S. C. 355 (h), 371 (f).

¹⁴ See, e. g., The Fair Labor Standards Act of 1938, 29 U. S. C. 210; The Civil Aeronautics Act of 1938, 49 U. S. C. 646; The National Labor Relations Act, 29 U. S. C. 160 (e)-(i).

¹⁵ As in Section 204 of the Emergency Price Control Act, 50 U. S. C. App., Supp. V, 924

mination shall be submitted to a jury to determine whether the trier of the facts—the administrative agency—had warrant in the administrative record for its finding.

Accepting this Court's conclusion that Congress intended a classification made by a selective service board to be final unless there is no basis in fact for the classification and the order of the board is thus in excess of its jurisdiction, we submit that there is a total absence of any indication that Congress intended this kind of judicial review—a judicial review which this Court said is narrower than that which normally obtains—to be performed by a jury.¹⁶ This is particularly so when it is recalled that the local board, like the jury, is drawn from the community for the purpose of finding the facts. Its special competence is the same as the jury's. The board having found the facts, there is no occasion for intercession by the jury thereafter. The task of reading a record to determine whether there is a basis in the evidence for a finding of fact is

¹⁶ Compare *Smith v. United States*, 157 F. 2d 176, 183-185 (C. C. A. 4), where a judgment of conviction was reversed because the jury, at the defendant's request, was permitted to determine whether the defendant was a minister of religion and whether the local board properly classified him under the statute. The circuit court of appeals thought that "the theory on which the case was tried was so fundamentally wrong that we should take notice of the mistake of our own motion," notwithstanding that the case was tried on that theory at the instance of the defendant and over the objection of the Government.

characteristically one for the judge, whether he is reviewing the findings of an administrative agency, a jury or another judge who was the trier of the facts.

Thus, in our view, the trial judge performs the function in respect of testing the legal validity of a selective service classification that the Emergency Court of Appeals performs in reviewing an order of the Price Administrator. Just as the jury has no place in the latter type of review, it has no function in the process of judicially reviewing a selective service classification. The *Yakus* decision illustrates the fact that neither the Fifth nor the Sixth Amendment entitles a defendant in a criminal trial to a jury verdict on the sufficiency of the evidence to support the administrative finding of fact. Both judicial and congressional practice negative the possibility that Congress ever intended to lodge in a jury in a criminal trial the power judicially to review a selective service classification.

Our view leaves the registrant in the same judicial situation whether he seeks to challenge the administrative determination by resorting to habeas corpus or by asserting the challenge as a defense in his criminal trial. Thus, for example, in *Eagles v. United States ex rel. Samuels*, 329 U. S. 304, the registrant submitted to induction and then resorted to habeas corpus to challenge his selective service classification. The district judge received the selective service file in evidence

and determined, upon examination of it, that there was basis in fact for the classification. When the case reached this Court, the file was independently examined and this Court reached the same conclusion. 329 U. S. at 316-317. If, instead of complying with the order of his local board and submitting to induction, Samuels had refused to submit and had been prosecuted for that refusal, we believe that he would have been entitled to precisely the same judicial review that he had in the habeas corpus proceeding, but nothing more. Congress no more intended judicial review by jury in one case than it did in the other.

II

PETITIONER ROISUM'S TRIAL WAS FREE OF ERROR

The procedural situation presented by petitioner Roisum's case differs in some respects from that of the other two cases. For petitioner's case was tried along the lines which we have outlined in Part I of the Argument. The selective service file was received in evidence (R. 27), and the trial judge determined that there was basis in the record for the refusal of the board to classify petitioner as a minister of religion (R. 51).

None of the evidence which petitioner offered at the trial was erroneously excluded. Petitioner's basic contention is that the court erred in rejecting his requested instruction to the jury and in subsequently denying his motion for

judgment of acquittal after verdict or, in the alternative, for a new trial.

The requested instruction was in the following terms (R. 50):

The Court hereby instructs you that if you find that Local Board No. 1, Yakima County, Sunnyside, Wash. erroneously classified defendant in Class IV-E, that their order issued to defendant to report to the C. P. S. Camp was void and your verdict should be "not guilty."

Even assuming that the issue was for the jury, the instruction was properly refused. For error in classification is not a defense. In the words of the Court in the *Estep* case (327 U. S. at 122), "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous."¹⁷ Petitioner offered no proof that the decision of the local board was not made in conformity with the regulations. Instead his claim, as the district judge characterized it (R. 45), presented a "difference of opinion between the registrant and his Draft Board as to his classification."

After he was convicted, petitioner for the first time challenged the jurisdiction of his local board. By motion for judgment of acquittal notwithstanding the verdict and, in the alterna-

¹⁷ See also, *Eagles v. United States ex rel. Samuels*, 329 U. S. 304, 312.

tive, for a new trial (R. 49, 50; see also, R. 12-13), petitioner asserted the claim that the local board acted arbitrarily and capriciously in denying him classification as a minister of religion and in classifying him as a conscientious objector. The court took the motion under advisement and set it down for argument with a similar motion in a companion case (R. 49). The motion was subsequently denied because the court concluded that it was without basis (R. 51).¹⁸ Upon appeal, the circuit court of appeals thought that the evidence in the selective service file substantially supported the administrative classification (R. 64-65). Thus, the question which remains is whether the courts below properly held that the selective service board did not exceed its jurisdiction by refusing to classify petitioner as a minister of religion.

1. *Ministerial status.*—To demonstrate to the selective service boards that he was an ordained minister of religion, as he claimed, petitioner was required to meet the standards of Section 622.44 (c) of the regulations as construed with respect to Jehovah's Witnesses by the Director of Selective Service in Opinion No. 14 (amended), promulgated November 2, 1942. Section 622.44 (c) (*infra*, p. 54) defined a duly ordained minister of religion as—

¹⁸ At the same time the court granted the motion in the companion case because "I find no ground for the action of the Draft Board" (R. 51).

a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs these duties.

On June 12, 1941, the Director of Selective Service issued Opinion No. 14 and on November 2, 1942, he issued Opinion No. 14 (amended). The latter opinion was in effect during the period when petitioner was finally classified by his board of appeal. This opinion stated that Jehovah's Witnesses were considered to constitute a recognized religious sect and that certain members of the group "by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions." The opinion stated that a certified official list had been prepared which contained the names of those members of the sect whose activities made them eligible for classification as a minister of religion. In respect of persons

whose names were not on the list¹⁹ the opinion explained that—

It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

We think that the Selective Service System thus recognized that the religious leaders of the Jehovah's Witnesses sect were entitled to exemption from military service just as the leaders of any other religious group were entitled to classification in IV-D. On the other hand, it is equally clear that the Selective Service Regulations, as construed by Director's Opinion No. 14 (amended), did not assume that every member of the Jehovah's Witnesses sect should be exempted

¹⁹ It appears from petitioner's selective service file that his name was not on the list.

from military service. Instead, they contemplated that only those persons who stood in the same relation to the Jehovah's Witnesses sect as recognized ministers in other religions do to their followers shall be classified in IV-D. This view is consistent with the view of the circuit courts of appeal in applying the ministerial exemption to factual situations like that presented in this case. Early in the administration of the Act, Judge Simons speaking for the Sixth Circuit in *Rase v. United States*, 129 F. 2d 204, 209, met the question squarely in the following terms:

The phrase "minister of religion" as used in the Act is to be interpreted according to the intention of the Congress, and not by the meaning attached to it by the members of any particular group. Congress undoubtedly intended to exempt such persons as stand in the same relationship to the religious organizations of which they are members, as do regularly ordained ministers of older and better known religious denominations. This is borne out by the provision for the exempting of theological or divinity students. If we understand the appellant's argument, every member of his sect is a minister of religion and so entitled to exemption. No differentiation is to be recognized between shepherd and flock or between pastor and congregants. Followed to its logical conclusion, this would mean that all of the members of any religious group which imposes upon its adherents an

obligation to teach and preach its beliefs or to make converts, are exempted under the Selective Service Act without regard to whether such activity constitutes their sole or principal vocation. It is inconceivable that it was the intention of the Congress to incorporate in the Act an exemption so broad and all-embracing. The statutory exemption must be applied in consonance with the clearly apparent purpose of the Congress, and not in response to the interpretation placed upon it by particular religious groups or their adherents.

See also, *Sunal v. Large*, 157 F. 2d 165, 175, and cases there cited.

2. *The facts bearing on petitioner's final classification.*—The facts shown by the documents contained in petitioner's selective service file are summarized in the Statement, *supra*, pp. 9-11. They foreclose the conclusion that there is no basis in the administrative record for the refusal of the board to classify petitioner as a minister of religion.

When petitioner registered with the local board in December 1941, he was twenty-two years old. He requested classification as a minister on the basis of his representation that he was ordained in June 1940, and that of the Watchtower Society that he devoted his "entire time" to his religious work. In the conscientious objector's form which he filed, he identified one Hazen, the local leader of the society, as his minister of religion.

At the very same time that these representations were made, the board was informed, too, that for the past fifteen years petitioner had worked on his father's farm. Indeed, his father submitted an affidavit stating that petitioner was necessary to the operation of the farm, evidently for the purpose of obtaining for petitioner an occupational deferment.²⁰ It appears from the records of the society, which were submitted to the board, that petitioner devoted as little as 11 hours in the month of November 1942 to activities of the group and that his maximum effort was 69 hours in February 1943. His average for the six month period from October 1942 through March 1943 was one hour and twenty minutes a day! Notwithstanding these figures from the Society's records, the Watchtower Bible and Tract Society represented to the local board that petitioner devoted his "entire time" to his religious work.

There is no evidence in the file that petitioner pursued a course of religious study which equipped him to be a religious leader for other members of the group. Nor is there any evidence that petitioner in fact was the religious leader of the local unit of Jehovah's Witnesses. Indeed, the contrary is true. For Hazen, whom petitioner recognized as his minister, occupied that position. The most that can be said for petitioner is that his

²⁰ The minutes of the local board recite that on October 6, 1942, the parents personally appeared before the board to urge petitioner's deferment. Their request was denied.

occupation was that of a farmer and his religious faith was that of the Jehovah's Witnesses. The evidence before the board did not require the conclusion that petitioner devoted his life to the furtherance of his religious beliefs, or that his status in the sect in relation to other members of the group is the same as that of a minister to his congregation in other religious groups, or that petitioner regularly performed the religious functions which are performed by ministers in other religious groups.

Unless every active member of the Jehovah's Witnesses group is a minister of religion within the meaning of the act and regulations—and that is the argument which petitioners urge—we think it plain that the classifying board did not flout the command of Congress in denying petitioner an exemption as a minister of religion. To deny petitioner's basic premise that Congress intended to exempt from military service tens of thousands of Jehovah's Witnesses is to deny the obvious. Congress drew a definable line between the shepherd and the flock. And the Selective Service Regulations respected that line. It cannot be said, we submit, that petitioner's evidence permits only the conclusion that he is on the shepherd side of the line. The judicial inquiry probes no further. *Eagles v. United States ex rel. Samuels*, 329 U. S. 304, 307.

III

THE ERROR OF THE DISTRICT COURT IN THE COX AND THOMPSON CASES IN FAILING TO DETERMINE WHETHER THERE IS BASIS IN FACT FOR THE REFUSAL OF THE SELECTIVE SERVICE BOARDS TO CLASSIFY PETITIONERS AS MINISTERS OF RELIGION WAS CURED BY THE PERFORMANCE OF THAT FUNCTION BY THE CIRCUIT COURT OF APPEALS

A. As in the *Roisum* case, the pertinent contents of the selective service files of petitioners Cox and Thompson were received in evidence at their criminal trials (see *supra*, pp. 5, 8). However, unlike the situation in the *Roisum* case, the trial court did not specifically determine that there is basis in fact for the refusal of the classifying boards to classify petitioners as ministers. Concededly, this was error. *Gibson v. United States*, 329 U. S. 338.²¹ We urge, however, that the error could not have substantially prejudiced petitioners. For on their appeals to the Circuit Court of Appeals for the Ninth Circuit, that court examined the selective service files, which were before it as exhibits, and the court determined that there was substantial evidence in support of the classification made by the selective service boards.

²¹ The discussion assumes that our position in Part I is correct. If we are mistaken and this Court holds that the question of the jurisdiction of the selective service board is an issue for determination by the jury, then the convictions in all three cases must be reversed.

Section 269 of the Judicial Code (28 U. S. C. 391) provides:

* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

This Court has indicated that in each case the application of the statute requires a review of the entire record and a judgment of the court as to the possibility that an error of the trial court did not actually affect substantial rights of the defendant. *Kotteakos v. United States*, 328 U. S. 750. We have approached these cases bearing in mind the philosophy in respect of the "harmless error" statute which the *Kotteakos* decision reflects. And in view of the substantial nature of the defense upon which petitioners relied in the district court, we have assumed the burden of demonstrating that the error of the trial court was harmless. See 328 U. S. at 760. Though the burden ordinarily is, and should be, a heavy one, we believe that there is hardly room for doubt in these cases that the error was harmless, if our conception of the defense permitted by the *Estep* decision is correct.

Petitioners' defense in the trial court was that there is no basis in fact for their selective service

classifications.²² As we have shown, *supra*, pp. 28-29, this foreclosed judicial consideration of issues of credibility or of weight to be given to the various items of evidence in the selective service files. It was for the court to determine only whether on any reasonable view of the evidence in the administrative record there is a basis for the refusal of the boards to classify petitioners as ministers of religion. This function, of course, can be performed at least as well by an appellate court as by a trial court. Indeed, it is the usual function for appellate courts to review a record to determine whether there is sufficient evidence to sustain the findings of the trier of fact. See *Sunal v. Large*, *supra*, 157 F. 2d at 173,²³ where the Circuit Court of Appeals for the Fourth Circuit justified its independent examination of the selective service file, as follows:

²² In its full scope their contention was that they were entitled to a trial *de novo* on the issue whether they are ministers of religion. But, as we have shown, *supra*, pp. 26-27, the *Estep* decision does not go that far. They were entitled to show lack of jurisdiction by pointing to the absence of any basis in fact for the refusal of the selective service boards to classify them as ministers or to a substantial departure from the procedural provisions of the act and regulations. Petitioners made no effort to assert the latter ground. Hence, we assume, as did the court below, that their contention amounts to a challenge of the evidential basis for their classifications.

²³ Cf. *Goff v. United States*, 135 F. 2d 610 (C. C. A. 4); *Honaker v. United States*, 135 F. 2d 613 (C. C. A. 4); *United States v. Pitt*, 144 F. 2d 169 (C. C. A. 3).

If the result of the examination of the Local Board's file as made by the trial judge in this case is to be properly treated as a finding of fact, we would have no proper basis for rejecting it because it is not clearly erroneous. But as the file is completely in writing it may be considered to present a question of law. On this latter assumption we have considered the contents of the file for the purpose of determining, within the proper scope of review, whether it presents sufficient evidence as a matter of law to show that the Local Board exceeded its jurisdiction in its classification; or, on the contrary, whether there was a basis in fact for the classification it made.

The error of the trial court could not possibly have influenced the jury in either case. For the issues which went to the jury were not controverted by petitioners. They did not deny that they knowingly left the Civilian Public Service Camps to which they had reported. Indeed, it is plain that they did so for the purpose of instigating a criminal prosecution in which they could obtain judicial review of their selective service classifications. In these circumstances, it is difficult to perceive how the failure of the trial judge to decide the issue of law which petitioners' defenses presented could have in any way affected the jury's decision on the issues which were before it.

We are not unmindful that in the *Estep* and *Gibson* cases, this Court declined to inquire into the merits of the defenses urged by the defendants. But the Court did so because "the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction." 327 U. S. at 125; 329 U. S. at 351. There is present here what was lacking there. The petitioners were permitted to attempt to show that their local boards exceeded their jurisdiction. The errors occurred not in the exclusion of evidence properly tendered, but in the failure of the trial judge to decide the issue of law which was before him. In this respect, the cases are in the same posture as *Eagles v. United States ex rel. Samuels*, 329 U. S. 304, and *Eagles v. United States ex rel. Horowitz*, 329 U. S. 317. In both cases the selective service files were in the records which were before this Court, and the Court decided the question whether there was basis in fact for the classification, notwithstanding that the circuit court of appeals had not decided that question and that the parties had not pressed for a decision on that point.

Both the harmless error statute and the *Kotteakos* opinion (328 U. S. at 762) admonish that the determination whether there is reversible error present in a case should be based on an examination of the entire record. Petitioner's selective service files are parts of the records which must be

examined. If, as we believe, they convincingly demonstrate that there is basis in fact for the selective service classifications, there is no necessity for remanding the cases to the district court for new trials. The fact that these cases have been pending in the courts for approximately three years emphasizes the interests of public justice that they should be finally disposed of in this Court. To remand them for new trials would mean that the district court would be called upon to decide a question of law which already has been decided by the circuit court of appeals in the same cases and on the basis of the same selective service files upon which the district court would have to base its decision.

B. That the facts in the selective service files abundantly support the decision below that the selective service boards acted on the basis of evidence in refusing to classify petitioners as ministers is plain.²⁴ On the facts before the board it would have been less than difficult for the board to conclude that petitioner Cox's claim was asserted solely for the purpose of seeking a refuge from the draft. His evidence showed that his occupation is that of a truck driver and that he asserted a claim to exemption as a minister for the first time shortly after he was classified I-A.

²⁴ The contents of Petitioner Cox's file are summarized, *supra*, pp. 3-5, and a summary of Thompson's file appears at pp. 6-8, *supra*.

in 1942, when the war was flagrant, and approximately a year and a half after he had registered for the draft. His claim is that he immediately became a minister in January 1942 when he joined the sect, and that by witnessing from house to house he was performing the functions of a minister. In our view, there is serious doubt concerning his bona fides which the board was entitled to resolve against him. In addition, he did not enjoy the status of a leader in the sect and his functions were no different from those performed by any other members of the sect. Cox was a truck driver by occupation and at best a Jehovah's Witness by faith.

Similarly, petitioner Thompson's local board had before it evidence that for the thirteen years immediately preceding the draft Thompson was engaged in working in or operating a grocery store, except for a brief tour of duty in 1935 as an embalmer. He continued in this occupation during the war. He claimed he joined the sect in 1940, and the sect's records showed that he averaged about ten hours weekly in religious work during the period from October 1, 1942, through September 30, 1943, mostly in distributing books and magazines. Neither by training nor function was Thompson in any different status than the other members of the sect. He was no shepherd either; like the others, he was only a member of the flock.

CONCLUSION

For the reasons stated, we respectfully submit that the judgments of the circuit court of appeals should be affirmed.

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OCTOBER 1947.

APPENDIX

1. The Selective Training and Service Act of 1940, 54 Stat. 885, 57 Stat. 597, 50 U. S. C. Appendix 301-318, provided in part, as follows:

SEC. 5. * * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * *
SEC. 10. (a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist

of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (1) of this Act. * * *

SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act

* * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, * * *

2. Opinion No. 14 (amended), issued by the Director of Selective Service November 2, 1942, and construing Section 5 (d) of the Selective Training and Service Act and Section 622.44 of the Selective Service Regulations provided at the time when petitioners were classified, as follows:

Subject: Ministerial Status of Jehovah's Witnesses.

Facts:

Jehovah's Witnesses claim exemption from training and service and classification in Class IV-D as duly ordained ministers of religion under section 5 (d), Selective Training and Service Act of 1940, as amended, and section 622.44, Selective Service Regulations, Second Edition, which read as follows:

Section 5 (d). "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Section 622.44. "*Class IV-D: Minister of religion or divinity student.*—(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of

enactment of the Selective Training and Service Act (September 16, 1940).

“(b) A ‘regular minister of religion’ is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

“(c) A ‘duly ordained minister of religion’ is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.”

Question. May Jehovah's Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer. 1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The incorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation, the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character or organization of Jehovah's Witnesses renders comparisons with

recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions.

3. Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consist of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in the converting of others to their belief. A certified official list of members of the Bethel Family and pioneers is being transmitted to the State Director of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The mem-

bers of the Bethel Family and pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and they may be classified in Class IV-D. The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

4. The original paragraph 4 has been consolidated with paragraph 3 of this amended Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained

ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

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SUPREME COURT OF THE UNITED STATES

October Term 1947

No. 66

WESLEY WILLIAM COX

Petitioner

THE UNITED STATES OF AMERICA

No. 67

THEODORE DOMAINE THOMPSON

Petitioner

THE UNITED STATES OF AMERICA

No. 68

WILBUR BOBURN

Petitioner

THE UNITED STATES OF AMERICA

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**PETITIONERS'
JOINT PETITION FOR REHEARING**

HAYDEN C. CONINGTON
Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

□

No. 66

WESLEY WILLIAM COX.

Petitioner

v.

THE UNITED STATES OF AMERICA

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No. 67

THEODORE ROMAIN THOMPSON

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v.

THE UNITED STATES OF AMERICA

□

No. 68

WILBUR ROISUM

Petitioner

v.

THE UNITED STATES OF AMERICA

□

ON CERTIORARI TO

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITIONERS'

JOINT PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

To persuade one Justice, concurring in the judgment, to desire reconsideration and to aid a majority of the Court to so determine, is the purpose of this petition.

NOTE: Lack of a unanimous majority opinion with one Justice concurring in result only leaves the law in confusion. See pp. 58-59, *infra*, this petition.

GROUND S

One

Grave error was committed by the Court in giving a strict and narrow interpretation to the ministerial exemption of the Act contrary to history, policy, the spirit of the nation, and former decisions of the Court in considering similar exemptions provided for in other statutes.

Two

The Court misread the mind of Congress contrary to the plain intention expressed in the Act and declared by the President in the Regulations and unlawfully confined the exemption to only those ministers who came up to the standards of the orthodox clergy, as conceived by the personal religious notions of the Justices who joined in the controlling opinion.

Three

The Court erred in adding provisions to the Act and Regulations so as to require that the entire time of a minister be devoted to his ministry and that his sole financial support be from his congregation rather than extending the exemption to those who regularly and customarily teach and preach the doctrines and principles of a recognized church as the Act and Regulations plainly state, for the simple reason that it is not within the province of the Court to legislate, but only to interpret the legislation involved according to reason to avoid discrimination.

Four

The Court erred in setting itself up as a religious hierarchy to determine the qualifications of a minister according to the orthodox views of the members of the Court that joined in the controlling opinion, which limits the exemption to some ministers of some groups, instead of interpreting the law so as to apply equality to all ministers of all denominations and accomplish equal justice under law.

Five

The Court erred in abdicating its judicial power to determine the law as applied to the undisputed evidence and facts before the administrative agency and acted as a rubber stamp to execute the decision of a question of law by the administrative agency, thus bringing the statute into collision with Article III of the United States Constitution and converting the Act into a Bill of Pains and Penalties contrary to Clause 3, Section 9 of Article I of the Constitution.

Six

The Court committed fundamental error in overruling the assignments of error.

Seven

The Court committed fundamental error in affirming the judgments of the court below.

PRELIMINARY STATEMENT

The mere fact that the exemption of ministers appears in a statute designed for national defense in time of a great emergency does not warrant a rigid limitation of it. The legal 'benefits of clergy' provided for in the Act is no more restricted than such benefits similarly appearing in other acts and the Constitution. One who is a minister of the gospel sufficiently to claim protection of the 'benefits of clergy' provisions of the freedom of worship guarantee of the First Amendment to the Constitution should also be entitled to claim the 'benefits of clergy' exemption of the Act when it appears that he regularly and customarily teaches and preaches the principles of a recognized organization that sends him forth and recognizes him as a minister of religion.

In the absence of plain words showing an intention of the Congress to discriminate against some ministers of some organizations, such should not be read into the Act. The Court has no more authority to read such discrimination into the Act than it would have authority to read a similar limitation, which discriminated, into the Bill of Rights guaranteeing freedom to preach.

Such restrictive limitation adopted by the Court in these cases cannot be sustained on the ground that the Act was an emergency measure. Plain words even of emergency laws are not to be given strained and restrictive definitions unless it plainly appears to be expressly required by the law in which such specific words are used. (*Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 149-151) It should be remembered that the Constitution itself was a creature of an emergency. All know that the 'crisis of the confederation' following the end of the Revolutionary War presented a greater national emergency than the war itself. It was out of the struggle with the internal forces to divide the people that the Constitution came. It has been the refusal to re-

strict its beneficent terms in times of stress that has held the states together and kept the nation alive this long. Since the Court has no authority to restrict the securities in the Constitution in times of emergency it has no authority to legislate restrictions onto an exemption contained in an emergency law contrary to plain language and history of the Act as has been done here.

The restrictive interpretation of the Act in this case was an unnecessary contribution to the war effort. The successful prosecution of a war does not depend on the denial or restriction of the traditional exemption of ministers of religion from the performance of military service. The exemption provision in the Act, like the provisions of the First Amendment, is "a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes" of ministers, at "all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." (Ex parte *Milligan*, 2 Wall. 2, 120)

In dealing with people in the execution of a war measure such as the Selective Training and Service Act, designed as it was to protect the nation against aggression, there is a natural tendency to be impatient with all who do not fall into but who claim to stand on the outside of the 'man-power barrel'. All unorthodox groups that claim the benefits of the orthodox exemptions are frowned upon and viewed with suspicion, especially the unpopular groups like Jehovah's witnesses. But it should be remembered that the Act, spawned in an approaching hurricane of a totalitarian war, an emergency as great as the one that generated the Constitution, provided for exemption of all ministers of religion in spite of the emergency. This provision was made by Congress without discrimination, in the same way as the benefits in the First Amendment were made, also an

emergency measure. If the ministers of Jehovah's witnesses are protected under the Constitution (*Murdock v. Pennsylvania*, 319 U. S. 105) then why are they not given similar protection under the Act and Regulations here involved?

You may say, "Oh! But that Act was different. It was passed to wage total war and save the United States from acts of aggression." Again in answer, Was not the Constitution adopted under equally as great an emergency? Was the Selective Training and Service Act as an engine to be used in sacrificing the institutions the Constitution was created to preserve and protect? No! The Congress knew that there was no sense in creating a battle front without preserving the liberties of the people on the home front. The very purpose of raising a great armed force was to protect and preserve, above all other things, the heritages for which the founding fathers fought—civil liberties, the most outstanding being freedom of worship—which are valueless without ministers. What good does it do a people to have freedom of worship without a preacher? "How then shall they call on him in whom they have not believed? and how shall they believe in him of whom they have not heard? and how shall they hear without a preacher? And how shall they preach, except they be sent? as it is written, How beautiful are the feet of them that preach the gospel of peace, and bring glad tidings of good things!" (The apostle Paul at Romans 10:14-15). The very purpose of having ministers is to lead and guide the people in learning how to worship.

The natural complement of freedom to worship are ministers. Not "some" ministers of "some" denominations but "all" the ministers of "all" organizations are necessary. There is not the faintest suggestion or reason that Congress intended to confine the exemption to only "some" ministers of "some" denominations any more than there is a suggestion that Congress intended to limit the deferment to only "some" judges, Congressmen, state legislators, gov-

7
ernors and other deferred persons. It extends to all such. A discrimination cannot be imputed or implicitly found in the Act even when a specter like that seen through the controlling opinion in these cases appears.

We cannot help but feel that the Court has been influenced, unconsciously perhaps, by the policy arguments of the Government in all the draft cases of Jehovah's witnesses running all the way back to the argument in *Falbo v. United States*, 320 U. S. 549. In all these cases the Government has persisted in spreading jaundice through throwing up an apparition of terror and a phantasm of catastrophe if the Court should sustain the contentions of Jehovah's witnesses as to the construction to be given Section 5 (d) and its implementing Regulations.

The policy arguments of the governments are the same as those urged upon the rulers in ancient times concerning another one of God's servants. The case referred to is that concerning the faithful and youthful prophet Jeremiah. The time was a break in the siege by the Chaldean army. The scene was at the city of Benjamin. Jeremiah was arrested and jailed because of his preaching which he refused to stop. He was finally brought before the king on a writ where he was confronted by his accusers, the princes engaging in defense of the country and the city. They said to the king: "We beseech thee, let this man be put to death: for thus he weakeneth the hands of the men of war that remain in this city, and the hands of all the people, in speaking such words unto them: for this man seeketh not the welfare of this people, but the hurt." Then the king, Zedekiah, said: "Behold, he is in your hand: for the king is not he that can do anything against you." (Jeremiah 38: 4-5) Jeremiah was then put in a miry dungeon by the administrative authorities to die, where he remained until released through the importuning and help of Ebed-melech. (Jeremiah 38: 6-17) Certain it is that the policy arguments of the Government, identical to the policy argument of the

government that put Jeremiah in the dungeon, has got Jehovah's witnesses into a jam. This is a modern-day counterpart of his predicament where Jehovah's witnesses will remain unless and until some modern-day Ebed-melech' persuades the Court to grant this motion or reverse the erroneous decision in these cases.

Even in times of great emergencies a great nation does not suffer from liberality of treatment of those whose work is dedicated to furtherance of the worship of Almighty God, Jehovah. Throughout history great world powers and nations have traditionally exempted ministers from the performance of military training and service and the record shows that the strong nations dedicated to liberty were not parsimonious in the granting of the exemption.

Before the Roman Empire became a world power the nation of Israel conscripted men to wage war. (Numbers 1: 1, 3, 45, 46; 2: 32-34; 26: 1, 2) The conscription law of the Israelites also provided for exemption of the ministers and priests known as "Levites". (Numbers - 1: 47-54; 2: 33) Twenty-three thousand, a relatively large percentage of those of military age on the first conscription call, were ordered to be completely exempt according to the record. (Numbers 26: 62) The exemption was quite liberal, showing the confidence of the nation in the power that was backing it up in battles. The exemption was broad enough to include men who devoted only a "small fragment" of their time to the performance of their priestly duties. The record shows that the Jewish Levites actually served only two (2) weeks out of each year directly at the temple and at the three national annual feasts. But during the rest of the year they were permitted to remain at home to care for their family and do their own gardening, as well as any incidental local teaching and preaching that they might desire to do among the people in their home communities. (1 Chron. 24: 1-19; Neh. 12: 27-30; Num. 35: 1-8; Luke 1: 5-24) Their special consecration to Jehovah God sanctified

them to a different status from that of the rest of the Jewish population irrespective of the small amount of time devoted by them to the actual performance of their priestly duties.

With a system of conscription that had such broad and liberal exemption provisions the Jewish nation waged many wars and fought successfully many battles. If a small but powerful nation like Israel could afford to be liberal under its conscription laws during great national emergencies it seems that a mighty world-power like United States of America would not be endangered by being similarly liberal. Not until the Jewish nation became weak and tottering and forced to depend upon the support of friendly heathen nations for protection and salvation in times of war did the Israelites deny the exemption and curtail freedom on the home-front, as in the case of Jeremiah mentioned above. It is appropriate to remind the Court of the famous words of the great wartime President, Franklin D. Roosevelt, to wit: "We have nothing to fear but fear itself."

The phantom policy argument that if exemption were permitted to Jehovah's witnesses under the Act that effective war effort cannot be accomplished disappears when a realistic view of the facts is taken. During the war just ended there was no evidence that the people made use of Jehovah's witnesses to evade military duty. Being one of Jehovah's witnesses requires the unpopular following in the footsteps of Jesus in preaching, like Paul, publicly and from house to house. The heat of this unpopularity and the burden of the work is so great that it is not likely that a large number could stand it especially if their motives were to solely evade service. There is no evidence that any large number of Jehovah's witnesses, who claimed exemption, were insincere or engaged in the ministry to evade service. The number of such was infinitesimal. With all of its unlimited investigative powers and facilities the Government has failed to establish that Jehovah's witnesses

pursued the policy of claiming exemption to evade service. The undisputed evidence shows that they attempted to take advantage of their legal rights to protect themselves in their sincere effort to stick to their missionary evangelistic field as provided for under Section 5 (d) of the Act. Therefore to permit a rule to be formulated which will result in the persecution of many regular ministers for the purpose of getting at a few 'evaders' is like the folly of the man who burned part of his barn down to roast the pig.

A narrow construction which excludes a few of Jehovah's witnesses from the benefits of clergy provided for in a conscription Act results in no practical benefit to the war effort of the nation. Witness the results under the Act in question during this nation's participation in the recent conflict. Over four thousand of Jehovah's witnesses went to prison because of the narrow views of the draft boards under this Act. They were taken out of the civil population and put in prison. Even had this number received the exemption granted by the Act the nation would not have been weakened in the war effort.

The success or failure of the future military operations of this nation will not depend upon whether this Court gives a broad or liberal interpretation upon the Congressional exemption granted to ministers of religion. In this atomic age the forced presence of ministers of religion in the armed forces or prisons will not matter much in practical results. The holocausts of war, hitherto confined primarily to the battlefields, are now (through the atomic bomb) lurking at the doorsteps of every home of the home-front or nation. With the civilian population drawn right into the battlefield itself there is reason now, more than ever before, to give a broad and liberal interpretation to the exemption provisions of the Act so that the people can be insured of having sufficient ministers to serve them and sustain their morale during the suffering that they

may be forced to endure. The very purpose of the exemption was to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction." *Trainin v. Cain*, CCA-2, 144 F. 2d 944.

In this age of atomic warfare, the real and only protection of the people is from Almighty God. An armed force, according to the consensus of the military authorities and scientists, will be a weak defense against such weapon. At least a wise people would not risk the chance of losing protection of Almighty God by banishing His ministers from their fields of ministry. Peoples in times of old who showed favor to God's people were blessed and protected by God. Note the benefits of Egypt during the days of Joseph (Genesis, chapters 41-50), and the experiences of Hiram, king of Tyre, in the days of King Solomon (1 Kings, chapters 5-7). Many others could be named. Compare the misfortunes of the nations that persecuted God's people. Egypt was devastated at the Red Sea. (Exodus, chapters 1-14) Moab, Ammon and Edom were destroyed in battle. (2 Chron. 20: 1-35) Sennacherib was destroyed during an attack against Judah. (Isaiah, chapters 36-37) The world power Babylon was destroyed completely. (Jeremiah, chapters 50-51) All were destroyed because of their persecution or conniving at the persecution of the Lord's faithful servants or ministers.

The greatest contribution the members of this Court can make to the strength of the nation in any time of crisis or war or other national emergency is to preserve the institutions of democracy which the founding fathers fought so valiantly to protect against any and all encroachments. To take a course of abdicating and abandoning a small unorthodox and helpless group through a fiction of 'finality' of administrative determination is not salubrious to the nation itself. The fear of a breakup or disintegration of the national defense effort, fear of the enemy, or the fear of anything except the Constitutional mandate (faithful exer-

cise of the judicial function) inevitably leads to a trap and to a disintegration of the institutions of the republic itself. "The fear of man bringeth a snare: but whoso putteth his trust in the Lord shall be safe." (Proverbs 29:25) "The fear of the Lord is the beginning of wisdom." (Psalm 111:10)

INTERPOLATION

A

Simultaneously with the filing of this petition for rehearing there is filed a petition for writ of certiorari in the case of *Frederick Francis Zieber, Jr. v. United States*. In addition to the questions presented about the violation of the rights of Zieber to procedural due process by the local board, there is also presented there a question similar to that involved in these cases. The question urged by Zieber is whether the draft board acted arbitrarily and capriciously in rejecting Zieber's claim for exemption as a minister of religion. Although the facts in the case are somewhat similar to the facts in these cases, the draft board file is more explicit and full and shows in detail the orthodox ministerial standing of Zieber. Zieber is asking this Court to review the determination of the Court of Appeals which was that the draft board's action denying him his claim for exemption was valid. The Zieber petition for writ of certiorari presents again to the Court about the same question involved in these cases upon this petition. Accordingly, this Court is requested to defer ruling upon the petition for rehearing until the petition for writ of certiorari in *Frederick Francis Zieber, Jr. v. United States* is considered and determined.

B

It is the feeling of petitioners that the issue of exemption of petitioners from training and service was not as fully briefed and argued as it was in previous cases where it was not reached. (*Falbo v. United States*, 320 U. S. 549; *Estep v. United States*, 327 U. S. 114; *Smith v. United States*, 327 U. S. 114; *Dodez v. United States*, 329 U. S. 338; *Gibson v. United States*, 329 U. S. 338; *Sunal v. Large*, 67 S. Ct. 1588; *Alexander v. Kulick*, 67 S. Ct. 1588) Petitioners had every reason to believe that the Court would not pass upon the question as it did in those cases. In those cases it was avoided and decision of the question was not reached. In fact, the determination of the appellate courts in the *Smith* and *Dodez* cases, although misinterpreting the *Falbo* decision, also relied upon the same basis for affirmance of convictions, as did the court below in these cases. (*Smith v. United States*, CCA-4, 148 F. 2d 288; *Dodez v. United States*, CCA-6, 157 F. 2d 637.) Previously in the *Falbo*, *Estep*, *Smith*, *Dodez*, *Gibson*, *Sunal* and *Kulick* cases the Court did not decide the question. Therefore, the petitioners considered that the question would not be given any more consideration than was given to the question in the *Smith* and *Dodez* cases. There it was raised and could have been passed upon, as here. Not desiring to burden the Court with an argument as extensive as was made in the *Falbo*, *Estep*, *Smith*, *Dodez*, *Gibson*, *Sunal* and *Kulick* cases, the petitioners did not brief the matter as fully as was done in those cases. Now that the Court finally considered the point, which was not briefed as exhaustively as in those cases, and since, apparently, the Court has never heretofore considered the extensive arguments made in the other named cases, the petitioners shall here attempt to fully cover many of the points relied upon by the Court which were only sketchily briefed by them in their main brief. Therefore, the Court is respectfully requested to consider the material

which follows as though the Court were considering it for the first time in the main brief. It is necessary for the Court to thus consider the question and argument here made in order to afford the petitioners as complete and as fair a hearing as they would have received if they had fully briefed the question in their main brief. The petition will, as much as possible, be confined to calling to the attention of the Court matters which were apparently not noticed or considered by the Court in arriving at the decision rendered.

DISCUSSION

Although counsel for petitioners does not "give up", as stated by Mr. Justice Jackson in *Securities and Exchange Commission v. Chenery Corporation*, 67 S. Ct. 1575, 1760, yet concerning the controlling opinion, he now adopts as his language the words of Justice Jackson in that case: "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'"

The requirement that a minister of religion who regularly and "customarily preaches and teaches the principles of religion of a recognized church" or a "duly ordained minister of religion" must not perform secular work and must devote all of his time to the ministry cannot be understood because such is contrary to history. It defies religious custom and practice. It flouts the express declarations of the National Director of Selective Service. It is without the support of any authority. It is wholly without support of reason, necessity or justice. It is contrary to the plain definition of the words used in the Act and Regulations as defined in a dictionary accessible to all. The interpretation is discriminatory.

The construction is unduly restrictive. Such a requirement emasculates entirely the very purpose of the exemption of ministers of religion. It must be conceded that the construction placed upon the Act is limited and narrow.

The Court did not place a liberal construction upon the Act and Regulations. The failure of the Court to place a liberal construction upon the exemption is a departure from former decisions of this Court holding that a broad and liberal interpretation should be placed upon exemptions under the taxation statutes in favor of religious, charitable and educational institutions. *Trinidad v. Sagrada Orden* etc., 263 U. S. 578; *Helvering v. Bliss*, 293 U. S. 144. Cf. *Better Business Bureau of Washington, D. C., Inc. v. United States*, 326 U. S. 279, 283. This Court has held that a Federal statute against the importation of foreign laborers into the country under contract should be construed so as to exempt from its provisions a clergyman called from England to officiate at the Trinity Church in New York. (*Holy Trinity Church v. United States*, 143 U. S. 457.

"Although we have no established church, yet we have not been wanting in that respect, nor niggardly of those provisions, which seem proper for the clergy of all religious denominations. It has not been our custom to require the services of clergymen in the offices of constables, overseers of the highways or of the poor, jurors or others, of a similar nature." *Guardians of the Poor v. Greene*, 5 Binn. (Pa.) 554.

It seems that the stingy construction placed on the Act by the Court in these cases is a plain departure from the spirit of American institutions as declared by this Court in *Watson v. Jones*, 13 Wall. (U. S.) 679. In this case the Court said: "The full and free right to entertain any religious belief, to practice any religious principles, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." (13 Wall. at 728)

The basic error of the Court in this case is due to the restrictive, orthodox view of the members of the Court as to what constitutes a minister of religion. It was this same

misapprehension that led the Court into error in *Jones v. Opelika*, 316 U.S. 584. This erroneous decision was later reversed by this Court in *Jones v. Opelika*, 319 U.S. 103. See also the leading case overruling *Jones v. Opelika*, 316 U.S. 584, known as *Murdock v. Pennsylvania*, 319 U.S. 105. It is difficult to reconcile the decision of this Court in these cases and the decision of the Court in the case of *Murdock v. Pennsylvania*, *supra*. Since Jehovah's witnesses were recognized there as missionary evangelists doing ministerial work, having as high a claim to protection as the orthodox clergy preaching from the pulpit and engaged in preaching, then they should here also be found to be regarded under the Act as high as the clergy who "worship in the churches and [are] preaching from the pulpits." (*Murdock v. Pennsylvania*, 319 U.S. 105, 109.)

Although he dissented in the case of *Murdock v. Commonwealth*, *supra*, Mr. Justice Reed later concurred in the decision of the Court and stated that the activity of Jehovah's witnesses is "immune from interference by the requirement of a license. . . . [¶] As I see no difference in respect to the exercise of religion between an itinerant distributor and one who remains in one general neighborhood or between one who is active part time and another who is active all of his time, there is no occasion for me to state again views already rejected by a majority of the Court. Consequently, I concur in the conclusion reached in the present case." *Follett v. Town of McCormick*, 321 U.S. 573, 578. It seems that the same opinion should consistently be applied here in order to avoid discrimination, which was escaped by the majority decision in *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. Town of McCormick*, 321 U.S. 573.

"All proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general tolerant Christianity, is the law of the land."

(*Works of Daniel Webster*, vol. 6, p. 176; 10 Mich. Law Rev. 176) It should be remembered that this Court, in *Holy Trinity Church v. United States*, 143 U. S. 457, declared that the United States is a Christian nation. Thus, it does violence to that statement to presume that the Congress of the United States intended to outlaw Christian ministers by restricting the exemption to only orthodox clergy. The restrictive interpretation the Court has placed upon the Regulations would outlaw completely primitive Christianity as practiced by Jesus and his apostles. The restrictive construction of the Act would exclude Jesus and his apostles from the exemption provided for by Congress, if they were on earth in the flesh today. They would find that they would have no relief by this Court against the Sanhedrin views of an arbitrary draft board. Paul regularly performed, secular work during his entire ministry. He spent much time in tent making, so as to earn money and thus avoid being a charge upon those to whom he preached. (1 Thess. 4:10-12; 2 Thess. 3:7-17) He likewise taught the people publicly and from house to house. (Acts 20:20) Peter and several apostles were fishermen, while regularly and customarily performing their duties as apostles. (Matt. 4:18-21; Mark 1:16, 19; John 21:2, 3) Luke was a physician. (Col. 4:14) Jesus was a carpenter. (Mark 6:3) Jesus, as well as all of His apostles, was accused of being unlearned and ignorant. (Acts 4:13; John 7:15) The scribes and Pharisees, who were members of the Sanhedrin Court, an administrative body, conspired to wipe out Jesus and His apostles by finding they were not ministers. |

The ministers of the "sect of the Nazarene" were not regarded as ministers by that orthodox administrative agency in their day. This was due primarily to their unorthodoxy and their unpopularity. They preached from house to house and publicly upon the streets, which was contrary to the orthodox method employed by the elders,

the scribes and Pharisees, that presided in the temples.
(Acts 20:20)

The restrictive interpretation placed upon the Act and Regulations should be revoked and a more liberal one adopted. This is necessary so as to avoid discrimination against the petitioners who are modern-day followers of Christ Jesus, engaged in primitive preaching of the same gospel in the same manner as did he and his apostles.

The pages of history abound with proof that even ministers of orthodox denominations perform secular work during the week in order to sustain themselves in their ministry. Today some denominations have no paid clergy at all. Every minister in some denominations is required to perform secular work, although he may regularly and customarily teach and preach the doctrines and principles of his church as a minister. "Upon this point a page of history is worth a volume of logic."—Mr. Justice Holmes, *N. Y. Trust Company v. Eisner*, 256 U. S. 345, 349.

The Court has ignored entirely the Golden Rule in determining the construction to be placed on the statute. Surely the Court would have the members of the ministry treated in the same manner as they would have the members of the judiciary treated. In other words, the members of the Court undoubtedly believe in doing unto others as they would have others do unto them. Members of the judiciary are deferred by the Act. Members of the ministry are by the Act exempt. The performance of secular work or dependence upon income from activity other than the ministry is not mentioned in the Statute or Regulations, as far as the minister is concerned. Also nothing is said in the Act or Regulations about the amount of time that a regular minister should devote to his work. Nothing is said in the Act which would require that judges have no extra-judicial activity. Nothing is said in the Act that judges are precluded from earning money from sources other than their positions on the bench. However, the unreasonable and arbitrary

construction placed upon the Act by the Court in these cases, which denies a minister the right to exemption because he performs secular work in addition to regular performance of duties as a minister would, by force of the same reason, also require that a judge be denied the exemption because he did some extra-judicial work in addition to his duties as a judge. Such a conclusion, although logically drawn from the opinion of the Court in these cases, is obviously contrary to the Act and Regulations.

The conclusion of the Court that the performance of secular work and the imposition of orthodox standards in determining whether or not Jehovah's witnesses are entitled to the exemption under the Act is contrary to the administrative interpretation placed upon the Act by the Director. The policy of the Director from the inception of the Act and Regulations to the termination of the Act is expressed in State Director Advice No. 213-B, issued on June 7, 1944. In this Advice all former opinions in reference to religious organizations recognized under the Act, including Jehovah's witnesses, were consolidated. In that Advice the Director said, *inter alia*:

"Part III . . .

"2. It is the opinion of National Headquarters that the question of the *regular discharge of his duties as a minister* is a most important factor in determining whether a registrant should be classified in Class IV-D in accordance with the provisions of paragraphs (b) and (c) of section 622.44 of the Regulations. (Emphasis added)

"3. *The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work.*" (Emphasis added)

The liberal construction placed upon the Act so as not to confine solely to the orthodox clergy is demonstrated

by the fact that officers of the Salvation Army, Lay Brethren of the Catholic Church, the practitioners, readers and lecturers of Christian Science in the Church of Christ Scientist, cantors in the Jewish congregation, counselors of the Mormon Church, and colporteurs of the Seventh-Day Adventist Church were all declared by General Hershey to be exempt.

The narrow, restrictive and orthodox determination by the Court in these cases would also exclude entirely those persons above mentioned who were included within the exemption by the Director. The construction of the Act so as to exclude Jehovah's witnesses discriminates against them without cause, justice or reason.

The Court says, "We confine ourselves to the facts appearing in the Selective Service files of the three petitioners, although the only documents dealing with the petitioners' status as ministers were submitted by petitioners themselves." (Slip Opinion, p. 9) In discussing the facts on this petition for rehearing the petitioners likewise will confine themselves to the facts appearing in the Selective Service files. An examination of the files will demonstrate that each petitioner brought himself within the definition of a minister of religion according to orthodox views and to the administrative interpretation put upon the Act and Regulations by the National Headquarters of the Selective Service System.

As to Cox, there is not one iota of evidence in his file showing that at the time of his final classification he was not engaged in the ministry full time. It is true that on October 16, 1940, when he registered, he showed that he was a truck driver, having been such since 1936. It was not until March 20, 1942, that he showed he had become one of Jehovah's witnesses in January 1942. This appeared in the Conscientious Objector's form, which showed that he had been witnessing or preaching since January, 1942. The affidavits and certificates appearing in the draft board

file of Cox showed that beginning October 16, 1942, he had been engaged full time in the ministry and was able to average 150 hours per month in the performance of his ministerial, missionary and evangelist duties. There is no dispute of this uncontradicted, documentary evidence.

The Court intimates that it might have been possible to dispute such documentary evidence. Just how the Court provides no enlightenment, but leaves us to speculate. Although the Court says that no *de novo* evidence can be received upon the trial and holds that the determination is to be confined to the draft board record, the Court nevertheless says, "No evidence was introduced showing the total amount of time Cox had spent in religious activities since October 16, 1942. Nor was there evidence of the secular activities of Cox nor the time employed in them." (Slip Opinion, p. 3)

It should be quite obvious to any reasonable person that if Cox committed perjury in his affidavit filed with the board, showing that he was averaging 150 hours per month to "my ministerial duties without secular work" that the draft board would have so accused him and made a memorandum thereof which would appear in the file. Also, if Cox was lying, as the Court intimates, then certain it is the District Attorney would have questioned Cox about the truthfulness of his statement, "my entire time will be devoted to preaching the Gospel as a pioneer" and "I was able to average 150 hours per month to my ministerial duties without secular work." The very fact that neither the draft board nor the Government upon the trial questioned the statement of Cox appearing in his affidavit should convince a fair-minded person that his statements were true. Especially is this so in view of the ordination certificate of the Watchtower Bible and Tract Society, Inc., certifying that his "entire time" was devoted to missionary work as an ordained minister of the Gospel. It is hardly fair for the Court at this late date—considering the failure of the

board to raise it, or the Government to cross-examine Cox about it, or the trial court to even inquire about the matter upon his trial—to assert that the documents “do not prove that Cox spent full time as a ‘pioneer’ between October, 1942 and May, 1944.” (Slip Opinion, p. 9)

It seems that, before the Court would undertake to intimate that a minister and his religious organization had not told the truth, the Court, because of the failure of the district court to inquire into it, would have remanded this question to the district court for a new trial to ascertain whether or not perjury had been committed.

The Court says, “As he made claim of conscientious objector classification only after he was reclassified I-A from IV-F and still later claimed ministerial exemption, the board was justified in deciding from the available facts that Cox had not established his ministerial status.” (Slip Opinion, p. 9) This is a remarkable conclusion. The tentative class “I” given Cox on December 4, 1940, which was subject to a physical examination, was changed on January 31, 1941, to class IV-F, meaning that he was physically unfit for service, that continued to March 10, 1942, when he was reclassified in I-A. There certainly was no occasion for him to claim conscientious objector classification during the time that he was classified as physically unfit. Moreover a conscientious objector classification would of necessity have resulted in his being classified as liable for work in a C.P.S. camp. The facts giving rise to his claim for exemption as a minister did not occur until January, 1942. This was a change in status. On March 20, 1942, after the draft board disturbed his physically-unfit classification, he promptly made known the facts to the board. He could not have notified the board before January. The delay of slightly over one month is not such gross laches as to raise the inference that he lied when he finally supplied the board with information.

It is truly remarkable that the veracity of a registrant should be questioned by the Court because the registrant

attempted to comply with the Regulations and informed the board of facts in respect to his change of status. The Regulations required the registrant to keep the board informed of any facts pertaining to change of status. (See Sec. 626.1 of the Regulations.) It is a new theory in the law to hold that the compliance with that regulation would be grounds for denial of the claim for exemption. If this new theory manufactured by the Court is to be allowed to stand, then notification of every change of status to a board which resulted in exemption would make the exemption *ipso facto* invalid. This theory nullifies entirely the spirit of the Regulations that require a registrant to be classified according to his status at the time he is ordered to report.

The Court says, "The Board might have reasonably held that nothing less than definite evidence of his full devotion of his available time to religious leadership would suffice under these circumstances." (Slip Opinion, p. 9) What could be more definite evidence than a sworn affidavit and a certificate of the recognized religious organization backing up Cox in his claim for exemption? It is quite hard to understand how the Court can say that the board might have held that this was not definite evidence when the record wholly fails to show that the board specifically found that this was not definite evidence. Especially is this true in view of the fact that the Government on the trial in the District Court did not prove that the board did not consider this documentary evidence "definite evidence". This conclusion of the Court certainly nullifies all principles of criminal jurisprudence. The petitioner Cox was presumed to be innocent. The presumption of the regularity of the administrative proceedings does not overcome this presumption. The fantastic inference of the Court flies in the teeth of the record and the presumption of innocence. Cox has been convicted because of the Court's reading between the lines an impeachment of sworn documentary evidence. This is truly an innovation in criminal jurisprudence.

The Court advocates that the draft boards have the right to ignore the undisputed evidence in arriving at classifications. Indeed, the Court argues that the Selective Service System may reject unimpeached written statements and affidavits of persons acquainted with Jehovah's witnesses who make claims for exemption as ministers of religion before draft boards, and render decisions directly contrary to the unimpeached record.

This theory for the undue assumption of power by the draft boards, adopted by the Court, gives the boards greater powers than any other agency ever created by law. Even judges and juries do not have the right to reject undisputed evidence. To reject undisputed evidence is a violation of the right of due process. A decision by the draft board in the teeth of the evidence is dishonest. A dishonest decision is arbitrary and capricious. An arbitrary and capricious decision, contrary to the evidence, is unlawful and void. *Johnson v. United States* (CCA-8) 126 F. 2d 242, 247. "If it flies in the teeth of the facts which are before it, then its action is arbitrary and the registrant has not been afforded due process of law." SWYGERT, J., *Hull v. Stalter*, 61 F. Supp. 732.

In State Director Advice No. 213-B, issued by the National Director of Selective Service, concerning the consideration of evidence submitted by ministers to local boards, the Director instructed the boards that "In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status." (Part III, Par. 4)

If the draft boards are allowed to arrogate to themselves such extraordinary power accorded them by the Court, then no person would ever be able to establish any claim contrary to the whims and caprices of the members of the draft boards and the Selective Service System. Even a judge

who claimed deferment under the Act could be denied his claim for deferment from military training because the boards would have the authority to reject his written evidence proving his status as a judge of a court of record. If arbitrary and capricious draft boards have this power, then indeed they have been authorized by Congress to repeal the parts of the Act allowing deferment to members of Congress, members of State legislatures and the Governors of the various states.

It seems only reasonable to conclude that no draft board has the power to arbitrarily and capriciously reject undisputed written evidence and render a decision contrary thereto. Especially is this true in the cases where the written evidence submitted to the board is undisputed. The power of the draft boards to reject written proof is confined only to instances where it is positively and expressly established that the evidence is unreliable, false, discredited or impeached.

Determination of draft boards contrary to the undisputed evidence must be supported by some evidence. If a determination is made upon some grounds contrary to evidence received, the Regulations provide that the evidence relied upon by the board should be reduced to writing and placed in the registrant's file. (Reg. 627.13 (b)) This is absolutely necessary in order to preserve due process and the rights of the registrant upon appeal. Moreover, it is imperative that the draft boards make a record of the evidence they rely upon that does not appear in the file, in order that the board of appeal can properly perform its function in reviewing the determination upon appeal. How can a board of appeal or a Court properly pass upon the validity of a classification unless it has advantage of the same evidence that a draft board has? The courts and boards of appeal can consider only that which is reduced to writing. (Regs. 615.43, 627.13) It is mandatory that the boards reduce the evidence of perjury or impeachment to

writing in order that the file forwarded to the board of appeal, which classifies the registrant *de novo*, may be complete. (Regs. 615.43, 627.13) Congress did not intend to give unlimited power to a draft board nor authorize it to reject undisputed evidence and arbitrarily and capriciously classify the registrant according to caprice or rumors, hearsay or other incompetent evidence.

Petitioners have previously referred to the statement of the Court, "No evidence was introduced showing the total amount of time Cox had spent in religious activities since October 16, 1942. Nor was there evidence of the secular activities of Cox nor the time employed in them." (Slip Opinion, p. 3) It is quite obvious that after October 16, 1942, he had no secular activities. This was established by the undisputed documents appearing in the draft board file. There certainly was undisputed evidence showing "the total amount of time Cox had spent in religious activities since October 16, 1942." The documents plainly showed that he spent 150 hours per month. In the absence of any impeachment of this by the Government, it is highly indecorous for the Court, examining the record *de novo* and giving him a jury trial for the first time in these proceedings, to question or impeach the undisputed evidence appearing in the record. While Cox may have had secular employment from January to October, 1942, certain it is there is no evidence that he had any secular employment after October, 1942.

It was not what his status was prior to or at the time of his registration that determined his rights under the Act and Regulations. It was ~~what~~ that his occupation and status was on the date of the final classification that determines the legality of the action of the board. This would also apply to the objection made that Cox did not become a pioneer or full-time minister until after he was classified I-A. The fact is that he was a full-time pioneer minister devoting 150 hours per month to his ministry at all times since Oc-

tober, 1942. It was his status at and since October, 1942, and on the date of the final classification that really counts.

In the case *United States ex rel. Hull v. Stalter* (CCA-7) 151 F.2d 633, the same facts were urged by the Government. There it was contended that Hull had full-time secular work until after he filed his questionnaire, following his registration. Moreover, it was urged that he did not go into the full-time ministry until after he saw he was about to be drafted. Also it was contended, as the Court contends in these cases, that Hull did not have his name on a list. The court found that it was the status of the registrant at the time of the final classification rather than at the time of registration that determined the validity of the order. In that case the court said:

"We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. . . . The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than at the time of registration."

The petitioner Cox came clearly under the definition of what constitutes a minister of religion within the meaning of the Act. The documentary evidence, which was undisputed, appearing in the draft board file brought him within

the narrow view of this Court and Opinion No. 14 relied upon by this Court. "We agree, also, that Opinion 14 furnishes a proper guide to the interpretation of the Act and Regulations." (Slip Opinion, p. 9)

The undisputed evidence showed that Cox devoted "all or substantially all of" his time "to the work of teaching the tenets of" his religion. The record showed that he did "devote" his life "in the furtherance of the beliefs of Jehovah's witnesses." It was shown that he "performed functions which are normally performed by regular or duly ordained ministers of other religions." The draft board file showed that Cox was "regarded by other Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The undisputed evidence showed that all of his time at the time of his final classification was devoted to regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses. This conclusion that Cox is a minister of religion is supported by the definition of that term by the administrative interpretations of the National Headquarters of the Selective Service System. In his letter of July 15, 1946, printed by petitioner as an appendix to his brief in *Alexander v. Kulick*, No. 940 Oct. Term, Major Wherry for General Hershey, the Director of Selective Service, concerning pioneers who devote 150 or more hours per month to the missionary activity of Jehovah's witnesses, said, among other things:

"Other members of Jehovah's witnesses may be judged also by either of these standards. However, it would appear that most of them must be judged on the basis of the extent to which they have devoted their lives to the work of your church. Regarding this we have set no standard number of hours in religious work as a standard, although you have stated to us that a 'Pioneer is required to devote a specified minimum of 150 hours per month to his ministerial duties.' You have also told us that 'there are also a number of

special pioneers. These are required to devote 175 hours per month to their work

"As we have stated hereinbefore, we have not accepted your specified number of hours of work for a Pioneer as a standard of work for a member of the minor clergy. But where one of your men fails in meeting that quota, for reasons other than sickness, we feel that no good reason exists for us to take action with a view of procuring a IV-D classification for the man. Accordingly, we informed you that no further action was contemplated in this case. . . ." See also the large number of cases determined by National Headquarters listed in the Appendix to the joint brief for respondent Kulick and petitioner Sunal in *Alexander v. Kulick*, No. 840, October Term, 1946, at pages 1-32.

A recent case directly in point is that of *Louis Dabney Smith v. United States*. Smith, who became a full-time pioneer after his classification of I-A by the local board, appealed to the board of appeal and to the President claiming exemption as a minister of religion, that is, a IV-D classification. The Court of Appeals for the Fourth Circuit twice held that the classification of Smith was not arbitrary and capricious and that he was properly denied his claim for exemption. (See *Smith v. United States*, CCA-4, 148 F. 2d 288; *Smith v. United States*, CCA-4, 157 F. 2d 176) After the cause was remanded and the case was pending in the District Court the file in the *Smith* case, presenting facts much weaker than the *Cox* case, was submitted to the National Director of Selective Service again for review. The Director was asked to advise the Attorney General to dismiss the prosecution in the *Smith* case. He did so direct the Attorney General. Recently, on November 5, 1947, the Attorney General moved for dismissal of the indictment, which was granted by the District Court.¹ The opinion of the

¹ It should be here observed that the Government moved for dismissal of the indictments in *United States v. Estep*, *United States v. Gibson*, and *United States v. Dodes*.

National Director after review of the *Smith* case, is an authoritative interpretation of the Regulations, which should be applied in the *Cox* case. The letter of the Director to the Attorney General is set forth here:

**NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM**

Washington 25, D.C.

March 7, 1947

3-164-1

The Honorable

The Attorney General

Subject: Louis Dabney Smith

Order No. 14022

Richmond County Local Board No. 68
Columbia, South Carolina

My dear Mr. Attorney General:

We understand that the case of the above-named man has been sent back to the district court for rehearing.

Because of representations which have been made to this Headquarters we have given special consideration to this man's case. We have read much of the court records in the case and note that it has been asserted that this man had actually ceased all secular employment and was engaged full time in religious and ministerial duties for some time before he was ordered to report for induction. Such facts were not reflected by the registrant's file when the case was on appeal to the President shortly before the time he was ordered to report for induction. However, if such facts are true and if information reflecting these facts was contained in his local board file at the time he was ordered to report for induction we feel that he should have been

classified in Class IV-D and exempt from training and service as a minister of religion.

It is suggested that you take these matters into consideration in determining whether the man's case should be returned to the local board of jurisdiction for further classification action.

Sincerely yours,

(s) Lewis B. Hershey
DIRECTOR

The Seventh-Day Adventist Church colporteurs who are engaged in mere distribution of books from place to place and door to door were declared to be exempt. It is said: "Members of this church consider their colporteur evangelistic work to be of highest importance in the propagation of the faith. They look upon the men who do this work as engaged in a vocation comparable to the gospel ministry, even though they are not ordained." (State Director Advice No. 213-B, Part IV, Par. 10)

It is submitted, therefore, that there was absolutely no basis in fact whatever for the determination of the board of appeal that Cox was not a minister of religion, regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses and exempt from all training and service. The record showed that he devoted substantially all of his time to the ministry.

In respect to the *Thompson* and *Roisum* cases, the facts as stated by the controlling opinion of the Court are accepted, except for one omission in the statement concerning *Roisum*. The draft board record shows that prior to the final determination by the board of appeal there was an extensive hearing and examination of petitioner *Roisum* by a hearing officer of the Department of Justice. This officer reduced to writing a summary of the testimony taken from *Roisum*, and incorporated in his report was the summary

of an investigation among the neighbors of Roisum. In his report the hearing officer stated that there was no question as to the sincerity of Roisum and that substantially all of Roisum's time was devoted to the furtherance of his preaching activity as a minister. But also upon the facts appearing in the draft board files received in evidence on the trials of the *Thompson* and *Roisum* cases it appears that each comes clearly within the definition of an orthodox minister of religion. According to the draft board records they were "regular or duly ordained ministers of religion", as those terms have been defined by the National Director of Selective Service. It should be observed that the Court overlooked entirely that Thompson and Roisum stood in relation to the congregations of Jehovah's witnesses with which they were associated as do the orthodox ministers of the popularly recognized religions. Apparently the Court assumed, contrary to the facts, that Thompson and Roisum did not perform duties similar to those performed by the ministers of orthodox churches. The records irrefutably established that Thompson and Roisum occupied the same high position in reference to the congregations of Jehovah's witnesses as do the orthodox clergy. The records in their cases show, contrary to the statement of the Court, that they did occupy "leadership in church activities" and that they had dedicated "their lives to the furtherance of religious work . . ." (Slip Opinion, p. 9)

The draft board files of Thompson and Roisum show that in addition to the performance of the door-to-door missionary-evangelistic work, each was an "assistant company servant". The record showed that Thompson was a school instructor in the "Course in Theocratic Ministry". Thompson also showed that he was "advertising servant" and "book study conductor". In addition to occupying the position as a pioneer and assistant company servant, Roisum was also "back call servant" and "book study conductor". The affidavits filed by Thompson and Roisum undisputably

showed they were leaders of the congregations of Jehovah's witnesses with which they were associated. Their position as assistant company servant, advertising servant, back call servant and book study conductor caused each to be regarded "leaders" by other Jehovah's witnesses which is in the same manner that the orthodox clergy are regarded by their congregation.

The National Headquarters of Selective Service has accepted the recognition by the Watchtower Bible and Tract Society of its company servants (presiding ministers of congregations), assistant company servants (assistant presiding ministers of congregations) and other servants, in the congregation as proof that such servants occupy positions in the congregations of Jehovah's witnesses as are occupied by the orthodox clergy. In an administrative interpretation placed upon the Regulations by the National Director of Selective Service, expressed in his letter of July 15, 1946, printed by the petitioner in *Alexander v. Kulick*, No. 840, Oct. Term 1946, as an exhibit to the petitioner's brief, concerning Jehovah's witnesses, the Director said, *inter alia*, that "whether an official of the Jehovah's witnesses is to be recognized as a regular or duly ordained minister must be determined in each individual case based not only upon whether he is regarded by other Jehovah's witnesses as a minister of religion but also upon whether he performs functions which are those generally recognized as religious and ministerial functions normally performed by regular or duly ordained ministers of religion and the extent to which he devotes his life to the furtherance of your beliefs. . . .

"From this information we have gained the impression that many of your Company Servants and Servants to the Brethren hold positions of considerable religious leadership within the organization. We have felt that the demonstration of this leadership may qualify a man to be considered a minister of religion by Selective Service . . . This

has been done without regard to the question of the registrant's having been engaged in certain secular employment.

"We mention this because it appears that you feel undue consideration has been given by Selective Service to the secular employment engaged in by certain Jehovah's witnesses. We emphasize the fact that in our opinion the controlling factor in the final analysis of any case wherein a man claims to be a minister is the question of his ministerial work and not that of his secular employment. However, information indicating that a man who claims to be a minister is engaged in secular employment may raise a question regarding the extent that secular employment crowds out and precludes ministerial activities. . . .

"If the man demonstrates through his religious and ministerial work that he holds a position of leadership in your church and that his exemption 'is necessary to protect the church' or if the man demonstrates that he has consecrated his life to religious service, we feel that he is entitled to classification in Class IV-D and exemption from training and service."

Both Thompson and Roisum demonstrated that they held positions of leadership in Jehovah's witnesses as expressed by the National Director of Selective Service in the letter above referred to. If the mere devoting of two hours per week or even forty hours per week to secular work would justify the denying of an exempt classification to petitioners then all of the exempt persons and deferred persons under the Act would be in a very insecure position. It is not the incidental work that petitioners did on the side to earn a living that determined their right to the exemption. It was whether they had regularly and faithfully discharged their duties as minister missionary evangelists that settled the matter. The undisputed evidence and the record show that they were at all times faithfully preaching regularly and customarily. It is a distortion of the record to say that the hours per week devoted to secular work to earn

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a living prevented them from doing their ministry. Even forty hours per week devoted to such work would not and did not affect their ministry status. The performance of secular work was wholly immaterial to their ministerial status. Their vocation was that of missionary evangelists. It has never changed since the date of their being classified. Their avocation was secular work when not engaged in ministry duties. The contention made by the Court concerning the time spent in their ministry places an arbitrary construction upon section 5 (d) of the Act so as to result in injustices. Such makes a mockery out of the law and leads to unreasonable results. There is no evidence that they pursued the ministry as an avocation. It was their life-time work and occupation and they were entitled to pursue it.

The fact that Thompson and Roisum performed secular work in no way interfered with or prevented them from performing their duties as ministers of religion. The source of financial revenue of persons excused by the Act from the performance of training and service is wholly irrelevant and immaterial to the exemption and deferment granted by Congress.

The fact that a judge of a court may reside on a farm or ranch and/or operate it during his term of office in no way affects the statutory deferment as long as he fills the office of a judge. The fact that a governor of a state may own and operate some commercial business in no way weakens his claim for deferment under the Act. That a congressman may maintain a law office and carry on a lucrative practice while serving in the Congress in no way estops him from claiming the deferment granted by the Act. That a wealthy clergyman may devote all of his spare time to the caring of investments in bonds, stocks, real estate and other enterprises in no way deprives him of his right to claim exemption under the Act as long as he is recognized by his organization as a minister of religion.

and teaches and preaches regularly the doctrines and principles of a recognized religious organization.

The mere fact that a poor preacher of a financially weak congregation is required to perform secular work during the week to support himself in the ministry does not bar him from claiming the exemption as a minister of religion as long as he regularly and customarily teaches and preaches the doctrines and principles of a recognized religious organization. In determining whether or not there is basis in fact for a draft board determination denying a claim for exemption or deferment under the Act cannot be supported solely by a finding that such person had other activities on the side that would not, within themselves, entitle such person to exemption or deferment. If the facts establish that such person comes within the exemption or deferment granted under the Act, incidental activities not entitling him to exemption or deferment are wholly irrelevant and immaterial.

Denial of exemption or deferment upon these irrelevant and immaterial considerations is undoubtedly contrary to law, arbitrary and capricious and without basis in fact, thus establishing that the order denying the claim is in excess of the jurisdiction of the draft board. The error and trap into which the Court, as well as the lower courts, have fallen in these cases, is the result of pursuing these very irrelevant and immaterial considerations.

There is nothing in the terms of the Act indicating that the Congress intended to restrict the terms "regular minister of religion" or "ordained minister of religion". Indeed the records of the deliberations of the Congress indicate that it was the intention of the lawmakers to give the same broad definition to such terms as have been given by the whole people of the nation since the days of the first settlers of the country. That construction is a broad and liberal one so as to avoid discrimination.

The "Senate Committee on military affairs worked out

an amendment to the Burke-Wadsworth bill deferring the military training of certain groups, ministers and others. The amendment was not satisfactory to all the churches. On August 12 I submitted amendments which do have their approval. . . . In presenting this amendment to the Senate I assume that those persons charged with the administration of this Act will give to religion its proper place in a democratic form of government, and to this end will adopt such rules and regulations as will embody the accepted definitions of the terms 'regular or duly ordained ministers of religion' as those terms are meant within this amendment. . . . A regular minister of religion, as used in my amendment, should mean a person who as his customary vocation preaches and teaches the principles of a religion, of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (Senator Johnson of Colorado, 86 Cong. Rec. 10293, 10294. Cf. 86 Cong. Rec. 10095.)

The greatest part of the discussions in the deliberations of the Congress during consideration of the Burke-Wadsworth Bill insofar as they pertained to ministers and students preparing for the ministry were devoted almost exclusively to students preparing for the ministry. There is no question that it was definitely intended that students preparing for the ministry were considered by some of the Senators who discussed the matter as exempt only when they were engaged full time in the study. In other words, it was intended that the student preparing for the ministry should be a full-time student. There was nothing in the Act to indicate that if he worked at odd jobs to maintain himself in his schooling he would be denied his claim for exemption. The only requirement was that he be a full-time student and no more was demanded. Senator Walsh said, in his discussions of the provision for the exemption of

ministers, that "ministers of the gospel and actual students who are engaged in giving all their time in preparation for religious work should be exempted." (86 Cong. Rec. 10502) Mr. Connally asked: "The bill exempts all ministers actively engaged in their duties. Is that correct? Mr. Walsh: Yes." (86 Cong. Rec. 10505)

It seems to be the emphatic opinion of at least one Senator that it was not necessary that a minister of the gospel should have attended a divinity school as a condition precedent to becoming a minister of the gospel. Mr. Connally said: "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption [students preparing for the ministry]. Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle." (86 Cong. Rec. 10589-10590)

It was said that the provision for exemption of ministers in the Burke-Wadsworth Bill was the same as the provision which appeared in the 1917 Act. (86 Cong. Rec. 10293) The provisions of the 1917 Act while being considered by the members of the Congress were held to extend to regular ministers as well as the ordained clergy. It was provided that regular ministers, those not ordained as the clergy, should receive the same treatment as the ordained clergy received. (55 Cong. Rec. 1527, 1528) It was said that a regular minister "would mean a man whose calling is the preaching of the gospel and who follows that calling for a life work." (55 Cong. Rec. 1528)

The history of the discussions in the Congress shows

no intention to limit the interpretation of the term in the manner as the Government would have it limited. Indeed Senator McKellar considered that a lay preacher was exempted under the 1917 Act. He said: "I think it will be conceded by all the record of Sgt. Alvin York overtopped and overreached the record of any other plain soldier who went into the American Army. Sergeant York was a lay minister. At the time the draft was put into operation he was urged by his friends, he was urged by his own conscience, by his own belief in peace, and by his own horror of war to ask for an exemption from the army because he was a minister of a church. After careful consideration, he concluded not to ask for exemption, . . ."

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and service." *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-42, p. 239.

In order to give the Act and Regulations the broad interpretation contended for here, it is not necessary for the court to strain the language of the Act and Regulations. Indeed, all that has to be done is to put a reasonable interpretation upon the language of the Act and Regulations in the light of history.

The Act provides: "Regular or duly ordained ministers of religion and students who are preparing for the ministry . . . shall be exempt from training and service (but not from registration) under this Act." (Selective Training and Service Act, 54 Stat. 887, 50 U. S. C. App. § 305 (d))

The Regulations define a *regular minister of religion* to be "a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." (Reg. 622.44 (b))

"A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." (Reg. 622.44 (c))

These definitions do not say that the minister must be a member of an orthodox denomination. They do not exclude any member of any dissentient organization.

It is quite apparent that the Congress, in enacting the Selective Training and Service Act of 1940, did not intend to discriminate. It intended that the provisions of the exemption provision for ministers of religion should extend to all ministers of all denominations. There can be no question that the Congress intended to put upon the terms "regular minister of religion" and "ordained minister of religion" the same broad and commonly accepted definition that has been placed upon the terms in common parlance and in history of the ministry of the gospel in this country. Congress did not intend to limit the beneficent provisions of the exemption in the Act to any particular class of clergy or ministers. They intended to be fair to all. Since the Congress did not limit or restrict the definitions of the terms it is proper to consider what the terms have meant to the people in light of history and of other situations similar to that presented in these two cases.

The term "regular minister" is used in the Regulations. The term "regular minister" has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. *Ex parte Cain*, 39 Ala. 440-441.

It is to be observed that the Regulations use the word

"customarily". *Customary*, the word from which it is derived, is synonymous to "usual" and "habitual". It does not mean *continuously*. It is not synonymous with *continuously*, *uninterruptedly*, *daily*, *hourly*, or *momentarily*. The Century Dictionary defines "customarily" to mean "in a customary manner; commonly; habitually". Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores, and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching. If he regularly and customarily preaches during the week, he is a regular minister of religion under the Act and Regulations. The source of his income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain himself is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in

determining whether or not the minister regularly and customarily teaches and preaches.

In the general instructions concerning ministers of religion issued by the National Headquarters of the Selective Service System it is stated that the "historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case." (State Director Advice Number 213-B, Part III, Par. 3, Issued June 7, 1944.)² In the case of Jehovah's witnesses the historic nature of their missionary evangelistic society whereby every one must be a duly trained and equipped minister of religion regularly engaged in preaching as a missionary evangelist was almost uniformly ignored. The historic nature of the ministerial functions of other religious organizations was imposed in many cases so as to exclude Jehovah's witnesses from their claim for exemption.

The Director provided for the benefit of all religious organizations except Jehovah's witnesses the wise and generous provision that in "some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work." (*Ibid.*) In the case of Jehovah's witnesses it was directed that the eligibility of one of Jehovah's witnesses depended on whether "he devotes his life in the furtherance of the beliefs of Jehovah's witnesses". (*Ibid.*, Part IV, Paragraph 3). This was generally construed so as to deny Jehovah's witnesses engaged regularly in preaching the gospel as missionaries each week who supported "himself, either partially or wholly, by secular work."

In the case of Jehovah's witnesses it was required that

² Amended September 25, 1944. It incorporates the provisions of Opinion No. 14 of Volume III of National Headquarters Selective Service System Opinions concerning Jehovah's witnesses dated June 14, 1941.

they file a list of their full-time missionary evangelists known as pioneers. This list was frozen in 1942 and no names could be added to it. It was only the full-time missionary evangelists whose names were on this list that the National Headquarters declared to be entitled to consideration as ministers of religion. (*Ibid.*, Part IV, Paragraph 3) All bona fide full-time pioneer Jehovah's witnesses whose names did not appear on the list certified to by National Headquarters of the Selective Service System were eligible for consideration as ministers of religion only if they could establish, in addition to devoting their full time to the ministry, that (1) they performed functions normally performed by ministers of orthodox religion, and (2) they show that they were regarded by other Jehovah's witnesses as standing towards them as do the clergy of the orthodox religions. (*Ibid.*, Part IV, Paragraph 3)

Much emphasis is placed by the Court upon the absence of petitioners' names from the certified official list of Jehovah's witnesses forwarded to State Headquarters by National Headquarters of Selective Service System.

The Court said that in promulgating Opinion No. 14 the National Director of Selective Service appended a list of certain members of the Bethel Family and pioneers who were entitled to this exemption. None of these witnesses were on the list. The Opinion stated that "members of the Bethel Family and pioneers whose names did not appear on the list, as well as other Witnesses holding official titles in the organization, must be classified by the boards according to the facts in each case." (Slip Opinion, p. 8) Insofar as Thompson and Roisum claimed exemption because of their position of leadership in the congregations as assistant company servants (presiding congregational ministers) and other assistants, their ministerial status could not be affected by their failure to have their names upon the certified official list. Since the list was confined to the Bethel Family and full-time pioneers, there was no

relation whatever between the list and company and assistant company servants. Accordingly, the emphasis which is placed upon the failure to have their names appear on the list is wholly irrelevant.

To begin with, the requirement made by the Selective Service System that the Society file a list of its full-time pioneer ministers with National Headquarters was arbitrary. No other religious organization was required to file a list of its full-time ministers.

The presence or absence of the name of these ministers of Jehovah's witnesses did not justify the local boards or appeal boards in denying petitioners' claims for exemption as ministers of religion under the Act. It was the duty of the draft boards to classify each according to the facts appearing in the files irrespective of the absence of his name from the list of ministers filed with the Selective Service System.

Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the persons whose names were to be added.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of National Headquarters having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification by addition of a registrant's name to the list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the Director of Selective Service changed the policy regarding

the adding of names to the list, and discontinued the practice of placing new names thereon.

This Court can take judicial notice of the records of the Selective Service System showing the policy of that agency with respect to Jehovah's witnesses and the arrangements that the Watchtower Society was forced to comply with. The records of the system showed that such Society recognized and certified all of its ministers, including petitioners, whose names were not on that list, to be authentic, duly authorized representatives of it, and it recognized all of its ministers, including these petitioners, as ministers regardless of whether their names appeared on the list which was under the control of the Selective Service System.

When the local boards finally classified the petitioners, the policy had been changed and it was impossible to have their names added to the list. When petitioners were finally classified, the undisputed evidence showed that they were in full-time status as pioneer missionary evangelists with the Society. It was the duty of the boards to classify them according to their status at the time of their classification. The action of the draft boards and the argument of the Government is directly contrary to the decision of the Seventh Circuit Court of Appeals in *United States ex rel. Hull v. Stalter*, 151 F. 2d 633. In that case the court held that the absence of Hull's name from the list did not justify the arbitrary denial of the claim for exemption as a minister. The court pointed out that the list had been abandoned at the time he was classified and that the failure to have his name on the list was immaterial.

On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified official list. The opinion provided: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified list shall be determined

under the provisions of paragraph 5 of this Opinion." Paragraph 5 of the Opinion reads:

"5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The failure of one of Jehovah's witnesses to have his name appear upon the official list circulated by the Director of Selective Service to all State Headquarters does not militate against his claim for exemption as a minister of religion. It is the duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official list of pioneer ministers referred to in Opinion No. 14 or State Director Advice No. 213-B, does not authorize the

boards to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch v. Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards." (See Government brief, p. 15, n. 9 and pp. 17-18)

In a letter from General Hershey, Director of Selective Service, dated July 7, 1943, concerning the certified official list, he said, among other things; "The official list of Jehovah's witnesses, is no more than information from National Headquarters as to those members, who within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers."

While inclusion of the name on the list may be considered by the draft boards in classifying a registrant, the absence of or even removal of a person's name from the list is not made the conclusive and exclusive test. The list was established and was maintained as a convenience by the Selective Service System and the Watchtower Society in taking appeals and other administrative action. It was never considered by the System and the Society to exclude from consideration by boards the exemption claim of other persons whose names did not appear thereon.

It is plain that the right of Jehovah's witnesses to classification as ministers of religion under the Act and Regulations is not confined to those whose names appear upon the certified official list circulated by National Headquarters to the various State Headquarters of the System. Indeed,

Opinion No. 14 (now superseded by State Director Advice No. 213-B) extends to full-time or part-time ministers of Jehovah's witnesses like the petitioners here whose names do not appear on or have been removed from the official list.

It is respectfully submitted that the failure of the petitioners to have their names upon the certified official list should not be considered as basis for the denial by the boards of the claim of the petitioners for exemption as ministers of religion.

The holding of the Court whereby the Court implicitly found that the draft boards had rejected the certificates of the Watchtower Bible and Tract Society, Inc., central legal governing body of Jehovah's witnesses in the United States, is contrary to the basic principle of non-interference with decisions and rulings of ecclesiastical bodies by the judiciary in the United States. In 1871, this Court recognized that findings and decisions of governing bodies of religious organizations were final and conclusive upon the courts. The Court held that such findings could not be impeached. (*Watson v. Jones*, 13 Wall. 679) This same principle has not been deviated from by the Court. It has been extended into other situations. It has been held that the propriety of one's religious preachments, doctrines and beliefs are not the subject of judicial review or inquiry. (*United States v. Ballard*, 322 U. S. 78. See also the dissent of Mr. Justice Jackson at pages 92-95, his concurring opinion in *Ballard v. United States*, 67 S. Ct. 261 at page 265)

The decision of the Court, arrogating unto itself the power of deciding the orthodoxy of Jehovah's witnesses, has converted the Court into a religious hierarchy, with the power of deciding religious questions as well as judicial questions. The Supreme Court of Alabama in reviewing a similar administrative determination under the Conscription Act of the Confederacy during the Civil War, envisioned and avoided the snare into which this Court was led. That was in the case of *Ex parte Cain*, 39 Ala. 440. In

that case the Alabama court said: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

In the decision styled *In re Reinhart* (9 Ohio Dec. 441, 445) the court said: "The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations, much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican and Greek churches, consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers.'"

It cannot be argued that Congress intended to discriminate between ministers of any religious organization. It is highly improper and asking that an unreasonable construction be placed upon the Act to impute to Congress the intention of saying that only some ministers of religion shall be exempt from training and service. Congress did not intend to forge an instrument that may be used to oppress ministers of unpopular and unorthodox religious organizations.

The petitioners accept the holding of the Court in *Estep v. United States*, 327 U. S. 114. In the opinion of the Court in that case, the Court said, *inter alia*: "The provision making the decisions of the local boards 'final' means to us that

Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." This undoubtedly means that in a case involving the claim for exemption as a minister of religion, if there is no basis in fact for the denial of the claim for exemption, then it would be the duty of the court to hold the order of the board directing the one claiming the exemption to report for work in a C.P.S. camp to be in excess of the jurisdiction of the board.

The petitioners assert that there is no question of weighing the evidence or preponderance of evidence before the boards involved in these cases. The undisputed evidence before the boards showed that each minister was regularly and customarily engaged in preaching and teaching the doctrines and principles of a recognized religious organization at the time of his final classification. Basis in fact in determining whether petitioners are ministers cannot be supported by fantastic inferences or irrelevant matters.

In determining whether or not there is basis in fact for the denial of petitioners' claim for exemption it is the duty of the Court to follow the Regulations defining a minister of religion under the Act, as well as give regard to the administrative interpretations. The Regulations provide that a regular minister or an ordained minister who regularly and customarily preaches and teaches the doctrines and principles of a recognized organization is exempt as a minister of religion.

None of the boards challenged as false the claims made by the petitioners. Neither of the trial courts claimed that

petitioners' evidence before the boards was false. The Government did not indict the petitioners for making false representations to the draft boards. The failure of the Government, the courts below and the draft boards to charge the petitioners with making false representations leaves this Court in the position of having to assume as absolutely true the documentary evidence, undisputed, which was submitted by petitioners to their local boards. Therefore, there was no question about weighing the evidence involved before the courts below or before this Court. Every statement contained in the documentary evidence submitted by the petitioners must be accepted as true.

While the Act says that the determination of the board is "final", this 'finality provision' is confined to cases where there is a dispute of fact. If, as here, the facts are established by the undisputed evidence, then the finality provision does not prevent the Court from applying the law after an independent review of the facts established by the undisputed evidence. Certain it is that Congress did not intend to permit the draft boards to have the power to say that "white" is "black". To do so would hog-tie and hobble the courts and thus prevent them from exercising their judicial function under the Act. Basis in fact does not mean basis in some fantastic inference or arbitrary opinion and conclusion that may be drawn by a draft board upon the undisputed evidence. If the undisputed facts show that one is regularly and customarily preaching and teaching the doctrines and principles of a recognized church (as in the files before the boards in these cases) then there is no basis in fact for the denial of the claim for exemption and the final determination of the administrative agency. According to *Estep v. United States*, 327 U. S. 114, "decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." An erroneous determination made upon disputed facts is in conformity with the Regulations and is final. We have no such deter-

✓ mination here. On the contrary, the determinations of the boards were contrary to the evidence and departures from the Act and the Regulations. Therefore they were not "in conformity with the regulations".

To assume that the boards based their determinations upon age, previous secular occupation, previous training, physical condition, former classifications and other matters similarly not having anything to do with whether at the time the petitioners were regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses, is to permit the draft boards to defy the Act. It allows them to make decisions in the teeth of the evidence. It permits them to decide dishonestly. It grants them authority to make determinations beyond their jurisdiction. Certainly Congress did not intend that the boards should have the power to consider irrelevant and immaterial matters and ignore true criteria in determining whether or not one is exempt as a minister.

The doctrine of "no basis in fact" announced in *Estep v. United States*, 327 U. S. 114, as applied in this case, has here formed a rule which results in the very evil which *Estep* condemned, and which was made the basis by the Court for the reversal of *Smith* and *Estep*. This is called to the Court's attention by Mr. Justice Murphy in his dissent in these cases where he said, among other things, that "care must be taken to preclude the review of the classification by standards which allow the judge to do little more than give automatic approval to the draft board's action. Otherwise the right to prove the invalidity of the classification is drained of much of its substance ~~and~~ the trial becomes a mere formality." (See page 1 of his dissent in these cases.)

Has not the Court run around in a circle in considering these cases under the Act? The very thing which the Court found to be error in the *Estep*, *Smith*, *Gibson*, and *Dodex* cases has been approved by the decision of the Court in

these cases. The recrudescence by this Court of the misinterpretation of the *Falbo* decision, condemned in *Estep*, makes void all that was done by the Court in *Estep*, *Smith*, *Gibson* and *Dodez*. The lower courts misinterpreted *Falbo* in *Smith*, *Estep*, *Gibson* and *Dodez*. The lower courts misinterpreted *Falbo* in these cases. The misinterpretation of *Falbo*, which resulted in the conviction of the petitioners here, can no more be sustained here than it could be in *Smith* and *Dodez*. The results here should have been the same as in *Smith*, *Estep*, *Gibson* and *Dodez*.

It is respectfully submitted that the entire Court has overlooked an important point in interpreting Section 11 of the Act. Section 11 of the Act provides that those who violate their duty under the Act shall be prosecuted in the District Court. In prosecutions for conspiracy to evade or counsel evasion, under Section 11 of the Act the right of trial by jury is allowed. In a prosecution under Section 11 of the Act, where the accused is charged with making false statements to his draft board, the right of trial by jury to pass upon the veracity of the statements made is guaranteed.

Section 5 (d) of the Act requires one claiming exemption as a minister of religion to register, and that is all. If he is a minister that should end the matter, unless it can be proved that the person claiming exemption as a minister lied. If his claim is not shown to be false, then the exemption automatically should follow. The issuance of an order in the face of the claim for exemption, not proved to be false, is submitted to be out of harmony with the Regulations and, therefore, in excess of the jurisdiction of the local board. In prosecutions under Section 11 of the Act it should be the prerogative of the jury to determine whether or not the registrant has a duty to perform. The pertinent parts of Section 11 provide that any "person charged as herein provided with the duty of carrying out of the provisions of this Act, or the rules or regulations made or direc-

tions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or fine of not more than \$10,000, or both such fine and imprisonment. . . . ”

In determining whether or not the petitioners had a duty under the Act, it should be the responsibility of the jury, in cases where there are any different inferences of fact to be drawn, to pass upon whether or not the petitioners committed perjury or falsely claimed to be ministers. Perjury or the making of false statements as a basis for prosecution under Section 11 of the Act is for the jury. Such should be the rule here. It seems that what Mr. Justice Frankfurter said in his concurring opinion in *Estep v. United States*, 327 U. S. 114, is correct. There he said: “As in situations of comparable legal significance, a trial court may of course leave controverted issues of fact to the jury.” (327 U. S. at page 145; see also the decision of the Third Circuit Court of Appeals in *United States v. Zieber*, 161 F. 2d 90, holding that these various issues of fact should be submitted to the jury.)

Especially should this be true upon the issues of the statutory exemption of one as a minister of religion. In this connection the holding of the Court that the claim for exemption as a minister of religion under the Act does not present a jurisdictional fact but may be determined *de novo* and the distinction of *Ng Fung Ho v. White*, 259 U. S. 276, is fallacious.

The distinction of *Ng Fung Ho v. White* at page 12 of the slip Opinion is a distinction without a difference. The claim of exemption from deportation on account of American citizenship is not at all different from the claim of exemption from a duty under the Act because of being a

regular or duly ordained minister. The right to a judicial hearing of one's claim to exemption as a minister under the Act has been recognized in *Estep v. United States*, 327 U. S. 114, as required as a matter of due process.

Petitioners, like Ng Fung Ho, could not get a judicial hearing before the draft boards, as Ng Fung Ho could not before the Commissioner of Immigration. Since deportation involves a loss no greater than the conviction of a felony, which also involves the loss "of all that makes life worth living", this Court should also hold that the "judicial" trial of petitioners before the draft boards may be tested in these proceedings. If due process gave Ng Fung Ho a judicial hearing then, by force of the same reasoning, it should give these petitioners a judicial hearing. They have not yet received a judicial hearing because the Court has accepted the findings of the draft boards as conclusive. The findings of the draft boards were made conclusive by this Court in justifying the "basis in fact for the classification" upon matters wholly irrelevant to whether the petitioners were exempt as ministers of religion under the Act and Regulations.

Has not the Court by this sophistry and factitious syllogism permitted the guilt of the petitioners under the Act to be determined by the draft boards in these cases, where they have been denied the right of counsel? What good did it do petitioners to have counsel in the District Court, the Court of Appeals, and in the Supreme Court if the determination of guilt is by an administrative agency (where they were denied counsel) accepted by this Court as conclusive? Has not the Court, in examining the judgments of conviction, following a trial in the District Court (where there was no effort whatever to inquire into the validity of the draft board proceedings because of misapplication of *Falbo v. United States*) accepted as final and conclusive the star-chamber proceedings of an administra-

tive agency and executed such approval by invoking the criminal sanctions of the Act?

"No bill of attainder or *ex post facto* law shall be passed."

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings v. Missouri*, 4 Wall. 277.

In *Kentucky v. Jones*, 10 Bush (70 Ky.) 725, the Kentucky Court of Appeals held another act of the legislature violated the bill of attainder provision of the Constitution. The act provided for certain disqualifications of officeholders within the Commonwealth. Administrative agencies, called "boards of contest", were established. The findings of these boards were made final by the statute with reference to the disqualification of an officeholder. If such boards found an officeholder to be disqualified, he was ordered to cease and desist from holding office. A refusal to cease and desist from holding the office constituted a crime under the statute. Jones was declared disqualified and ordered to vacate his office; and despite the order he held office and refused to vacate. He was indicted and convicted for failing and refusing to obey the order of the administrative agency. The court said:

"... it will be seen at once that the construction converts that section into a bill of pains and penalties, and thereby makes it repugnant to that clause of the federal constitution which provides that 'no state shall pass any bill of attainder'... The statute created a 'contest' board, whose decision shall be final—binding and conclusive on the courts...

"... when the courts are called upon to enforce the judgments of the board, or to punish those who disobey its mandates, they have the power to inquire into and deter-

mine as to its jurisdiction in the particular case in hand. Without jurisdiction to act, the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world. . . .

"To admit that a contesting board may determine finally as to what constitutes legal disqualification for office would be to decide that the legislature, instead of confining these tribunals to the discharge of executive duties, and to the determination primarily of mere questions of fact, had, in disregard of the powers of government, existing by virtue of the first article of the constitution, created a high judicial tribunal—a court with powers and authority to determine finally and conclusively questions of individual rights arising under the constitution—and provided that it should be composed exclusively of high executive officers."

An act which undertakes to permit an administrative agency to inflict punishment, banishment or exile from the United States of a citizen, without judicial inquiry as to whether or not he was a citizen, was held to violate the bill of attainder clause of the Constitution, in the case styled *In re Yung Sing Hee* (Circuit Court. Oregon) 36 F. 437 (1888).

A statute of Iowa which provided for "vasectomy" of habitual criminals upon the finding of an administrative agency without judicial inquiry was declared to be a bill of attainder in *Davis v. Berry*, 216 F. 413.

Recently the Court, in reaching back to *Cummings v. Missouri*, 4 Wall. 277, had occasion to again reaffirm the doctrine which condemns the denial of judicial trials. An Act of Congress was held to be invalid as a bill of pains and penalties in *United States v. Lovett*, 66 S. Ct. 1073. A reference is made to the discussion in the opinions filed in this case for a more extensive discussion of the history of bills of attainder. See also the concurring opinion of Mr. Justice Black in *Keegan v. United States*, 325 U. S. 478, 495-498. A further discussion of the subject was made by Mr. Justice

Black in his dissenting opinion in the case of *In re Summers*, 325 U. S. 561, 573. Reference is also made to the discussion on this subject appearing in the Brief for Petitioners filed in *Smith v. United States*, No. 66 October Term, 1945, and in *Estep v. United States*, No. 292 October Term, 1945, at pages 95 to 105, inclusive.

CONTROLLING OPINION WILL NOT BECOME PRECEDENT

Since 1943 the Government and Jehovah's witnesses have been asking the Court to write an opinion upon the ministerial status of Jehovah's witnesses which would become precedent. In spite of the decision in this case the controlling opinion does not become precedent. The controlling opinion is opposed by an opinion of the minority which is of equal weight. The decision in this case is authority only upon the general result reached. (*City of Dubuque v. Illinois Central R. Co.*, 39 Iowa, 56; *Mapes v. Burns*, 72 Mo. App. 411; *State ex rel. People's Bank of Greenville v. Goodwin*, 81 S. C. 419) Upon such an important question as is involved in this case and especially after four years of asking the Court to settle the controversy it seems that an opinion would have been written by the Court which would have settled the law. As the law stands now, with a divided-court opinion and Mr. Justice Frankfurter concurring in the results reached by the justices who joined in the controlling opinion, the law is left in a state of muddled confusion. If, for no other reason alone than to

settle the matter so as to get a unanimous opinion of the majority the case should be ordered reargued and for that reason the petition for rehearing should be granted. Perhaps upon another argument one of the justices who joined on either side will be able to make up his mind sufficiently to join in the opinion of the controlling or dissenting side.

In the results of Mr. Justice Frankfurter's concurring in the controlling opinion only as to the decision but not as to the opinion of the four justices that joined in it there is presented a situation that is remarkable. It is reached only by the muddled and confused condition in which the law was left in *Downes v. Bidwell*, 182 U. S. 244. This decision dealt with the political status of the insular possessions acquired in the Spanish War. The judgment of the Court was announced by Mr. Justice Brown who filed the controlling opinion. A separate opinion was filed by Mr. Justice White, who concurred "in the results" only but for "reasons different from, if not in conflict with, those expressed in" the controlling opinion. Mr. Justice Gray agreed with the controlling opinion in substance only but not in detail. The Chief Justice and Mr. Justice Harlan filed dissenting opinions which were concurred in by Mr. Justice Brewer and Mr. Justice Peckham.

It seems therefore that on such an important question as is involved here which has not been settled by the Court but which should be settled more explicitly and clearly the cause should be reargued so that the mind of a majority of the Court can be made up so that a unanimous majority opinion rather than a decision can be reached.

Conclusion

Wherefore petitioners pray that the order and judgment heretofore entered herein, affirming the judgment of the court below, be set aside and held for naught and that, on the briefs heretofore submitted, this petition for rehearing be granted and order the cause to be reargued orally. Petitioners pray for such other relief as they may show themselves justly entitled to in the premises.

WESLEY WILLIAM COX

THEODORE ROMAIN THOMPSON

WILLIAM ROISUM

Petitioners

By HAYDEN C. COVINGTON
Counsel for Petitioners

Certificate

I, the undersigned counsel for petitioners, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioners

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SUPREME COURT OF THE UNITED STATES

Nos. 66-68.—OCTOBER TERM, 1947.

Wesley William Cox, Petitioner,

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v.

The United States of America.

Theodore Romaine Thompson,
Petitioner,

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v.

The United States of America.

Wilbur Roisum, Petitioner,

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v.

The United States of America.

On Writs of Certiorari
to the United States
Circuit Court of
Appeals for the
Ninth Circuit.

[November 24, 1947.]

MR. JUSTICE REED announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON join.

These cases present the question of the scope of review of a selective service classification in a trial for absence without leave from a civilian public service camp. Petitioners are Jehovah's Witnesses who were classified as conscientious objectors despite their claim to classification as ministers of religion. Ministers are exempt from military and other service under the Act. All three petitioners exhausted their remedies in the selective service process and complied with the order of the local board directing them to report to camp. Cox and Thompson were indicted for leaving the camp without permission, and Roisum was indicted for failing to return after proper leave, in violation of § 11 of the Selective Training and Service Act of 1940. 54 Stat. 885, 57 Stat. 597, 50 U. S. C. Appendix 301-318.

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COX v. UNITED STATES.

On their trials petitioners requested directed verdicts, at appropriate times, because the selective service orders were invalid and requested the court to charge the jury that they acquit petitioners if they found that they were ministers of religion and therefore exempt from all service. The trial judge did not grant petitioners' requests, however, and instructed the juries that they were not to concern themselves with the validity of the classification orders. Petitioners were convicted, and on appeal to the Circuit Court of Appeals their convictions were affirmed. We granted certiorari in order to resolve questions concerning the submission to the jury of evidence, to wit, the files of the local board of the selective service system, as relevant to the charge of violation of selective service orders. — U. S. —

Petitioner Cox registered under the Selective Training and Service Act on October 16, 1940, and in his questionnaire stated that he was 22 years old and had been employed as a truck driver since 1936. The local board classified him IV-F, as not physically fit for service, on January 31, 1941, and on March 10, 1942, changed the classification to I-A. Ten days later Cox filed a request for reclassification as IV-E (conscientious objector), stating that he had become a Jehovah's Witness in January 1942. The board at first rejected the claim, but on June 12 of the same year granted him the requested classification. Ten days later petitioner first made his claim for total exemption from service, claiming to be a minister of religion; the local board refused the exemption and its action was sustained by the board of appeal. On May 18, 1944, the board ordered Cox to report to camp, and on May 26 he complied and then immediately left camp and did not return.

Upon trial Cox's selective service file was received in evidence. It contained an ordination certificate from the Watch Tower Bible and Tract Society stating that Cox was "a duly ordained minister of the Gospel" and that his

"entire time" was devoted to missionary work. The file also contained an affidavit of a company servant, Cox's church superior, dated October 29, 1942, stating that Cox "regularly and customarily serves as a minister by going from house to house and conducting Bible Studies and Bible Talks." There was also an affidavit by Cox, dated October 28, 1942, stating that he was enrolled in the "Pioneer service" on October 16 and that he was "able to average 150 hours per month to my ministerial duties without secular work." He added that "my entire time will be devoted to preaching the Gospel as a pioneer." Cox testified at the trial in October 1944 as to his duties as a minister that he preached from house to house, conducted funerals, and "instructed the Bible" in homes. No evidence was introduced showing the total amount of time Cox had spent in religious activities since October 16, 1942. Nor was there evidence of the secular activities of Cox nor the time employed in them. Although the selective service file was introduced in evidence, and the trial court denied the motion for a directed verdict, it does not appear that the trial judge examined the file to determine whether the action of the local board was arbitrary and capricious or without basis in fact. At that time the lower federal courts interpreted *Falbo v. United States*, 320 U. S. 549, as meaning that no judicial review of any sort could be had of a selective-service order. In *Estep v. United States*, 327 U. S. 114, we held that a limited review could be obtained if the registrant had exhausted his administrative remedies, and the Circuit Court of Appeals in accordance with that decision reviewed the file of Cox and found that the evidence was "substantially in support" of the classification found by the board.

Petitioner Thompson also registered on October 16, 1940, claiming exemption as a minister. He stated in his questionnaire that he was 30 years old and that for the past 13 years he had operated a grocery store and had been

a minister since August 1, 1940. At first the local board gave him a deferred classification because of dependency, but then changed his classification to IV-E. Thompson appealed to the board of appeal on November 5, 1943, explaining his duties as a minister and presenting a full statement of his argument that as a colporteur he was within the exemption for ministers as interpreted by selective service regulations. He attached an affidavit from the company servant, which stated that Thompson during the preceding twelve months had devoted 519½ hours to "field service," representing time spent in going from house to house, and making "back-calls on the people of good will," but not including time spent in conducting studies at the "local Kingdom Hall." Another affidavit from the company servant stated that Thompson was an ordained minister of the Gospel, that he was serving as assistant company servant, and that he was a "School Instructor in a Course in Theocratic Ministry." Thompson also attached three certificates from the national headquarters of the Watch Tower Bible and Tract Society which stated that Thompson had been associated with the Society since 1941, that he served as assistant company servant and Theocratic Ministry Instructor, and also as advertising servant and book-study conductor. Unlike the other two petitioners, Thompson did not introduce an ordination certification from national headquarters stating that he devoted his entire time as a minister. Thompson also filed a statement signed by twelve Witnesses which stated that they regarded Thompson as an ordained minister of the gospel. No evidence was submitted indicating any change in Thompson's activities in operating his grocery store. The board of appeal sustained the local board in its classification, the board ordered Thompson to report to camp, and on April 18, 1944, he reported and immediately left. Thompson's trial followed the same pattern as Cox's, except that

Thompson was not allowed to testify concerning his duties as a minister.

Petitioner Roisum also registered on the initial registration day, and filed a questionnaire stating that he was 22 years old, that he had worked for the past 15 years as a farmer, and that he was ordained as a minister in June 1940. Roisum made claim to a minister's exemption but at the same time submitted an affidavit signed by his father saying that petitioner was necessary to the operation of his father's farm. In June 1942 Roisum filed a conscientious objector's form claiming exemption from both combatant and non-combatant military service; this form was apparently filed under misapprehension, since Roisum did not abandon his contention that he should be classified as a minister. In the form he stated that he preached the gospel of the Kingdom at every opportunity. Roisum also enclosed a letter from national headquarters of the Society stating that Roisum had been affiliated with the Society since 1936, that he had been baptized in 1940 and, "was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory in 1941" and that Roisum devoted his "entire time" to missionary work and was a duly ordained minister. The local board classified Roisum as a conscientious objector to combat service (I-A-O), and Roisum appealed on June 30, 1943. Roisum attached an affidavit from his company servant stating that Roisum was an assistant company servant, a back call servant, and book study conductor, and that by performance of these duties Roisum had acquitted himself as a "regular minister of the gospel." The company servant submitted a schedule showing the number of hours which Roisum had spent in religious activities for six months from October 1942 to March 1943, ranging

from as little as 11 hours per month to as many as 69, averaging about 40. The board of appeal changed the classification to IV-E and rejected Roisum's request that an appeal be taken to the President. Roisum was ordered to report to camp, disobeyed the order, and was arrested and indicted. The trial court declared a mistrial on Roisum's undertaking to obey the board's order and seek release on *habeas corpus*. Roisum subsequently failed to comply, apparently because of transportation difficulties, but finally reported to camp on May 23, 1944, as directed. He remained in camp for five days, left on a week-end pass, and never returned.

Upon trial Roisum made no effort to introduce new evidence showing the nature of his duties as a minister. He did request the court to charge that if the decision of the local board erroneously classified him in IV-E the order was void and after conviction he moved for a judgment of acquittal or a new trial on the ground that the evidence in his selective service file showed that the classification of the board was arbitrary and capricious. The trial judge examined the file and concluded that there was no ground to support Roisum's motion.

Petitioners are entitled to raise the question of the validity of their selective service classifications in this proceeding. They have exhausted their remedies in the selective service process, and whatever their position might be in attempting to raise the question by writs of *habeas corpus* against the camp custodian, they are entitled to raise the issue as a defense in a criminal prosecution for absence without leave. *Gibson v. United States*, 329 U. S. 338, 351-360. The scope of review to which petitioners are entitled, however, is limited; as we said in *Estep v. United States*, 327 U. S. 114, 122-23: "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It

means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." Compare *Eagles v. United States ex rel. Samuels*, 329 U. S. 304, and *Eagles v. United States ex rel. Horowitz*, 329 U. S. 317, in which a similar scope of review is enunciated in *habeas corpus* proceedings by registrants claiming to have been improperly inducted.

Section 5 (d) of the Selective Training and Service Act provides that "regular or duly ordained ministers of religion" shall be exempt from training and service under the Act, and § 622.44 of Selective Service Regulations defines the terms "regular minister of religion" and "duly ordained minister of religion."¹ In order to

¹ 54 Stat. 885, 888:

"Sec. 5. . . .

"(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Selective Service Regulations, 32 C. F. R., 1941 Supp.:

Section 622.44. "Class IV-D: Minister of religion or divinity student. (a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been

aid the local boards in applying the regulation, the Director of Selective Service issued Opinion No. 14 (amended) on November 2, 1942,² which described the tests to be applied in determining whether Jehovah's Witnesses were entitled to exemption as ministers, regular or ordained. The opinion stated that Witnesses who were members of the Bethel Family (producers of religious supplies) or pioneers, devoting all or substantially all of their time to the work of teaching the tenets of their religion, generally were exempt, and appended a list of certain members of the Bethel Family and pioneers who were entitled to this exemption. None of these Witnesses were on the list. The opinion stated that members of the Bethel Family and pioneers whose names did not appear on the list, as well as all other Witnesses holding official titles in the organization, must be classified by the boards according to the facts in each case.¹ The determining criteria were stated to be "whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded." The opinion further stated that the local board should place in the registrant's file "a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision."

It will be observed that § 622.44 of the regulation makes "ordination" the only practical difference between a "reg-

ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

² Opinion 14 (amended) is on file at the Office of Selective Service Records, Washington, D. C.

ular" and a "duly ordained minister." This seems consistent with § 5 of the Act. We are of the view that the regulation conforms to the Act and that it is valid under the rule making power conferred by § 10 (a). We agree, also, that Opinion 14 furnishes a proper guide to the interpretation of the Act and Regulations.

Our examination of the facts, as stated herein in each case, convinces us that the board had adequate basis to deny to Cox, Thompson and Roisum classification as ministers, regular or ordained. We confine ourselves to the facts appearing in the selective service files of the three petitioners, although the only documents dealing with the petitioners' status as ministers were submitted by petitioners themselves. The documents show that Thompson and Roisum spent only a small portion of their time in religious activities, and this fact alone, without a far stronger showing than is contained in either of the files of the registrants' leadership in church activities and the dedication of their lives to the furtherance of religious work, is sufficient for the board to deny them a minister's classification. As for Cox, the documents suggest but do not prove that Cox spent full time as a "pioneer" between October 1942 and May 1944 when he was ordered to camp. As he made claim of conscientious objector classification only after he was reclassified I-A from IV-F and still later claimed ministerial exemption, the board was justified in deciding from the available facts that Cox had not established his ministerial status. The board might have reasonably held that nothing less than definite evidence of his full devotion of his available time to religious leadership would suffice under these circumstances.³ Nor

³ For a similar conclusion under the same subdivision of the statute, giving exemption to regular and duly ordained ministers of religion and students, see *Eagles v. Samuels*, 329 U. S. 304, 316-17:

"Nor can we say there was no evidence to support the final classification made by the board of appeal. Samuels' statement that he was best fitted to be a Hebrew school teacher and spiritual leader, the

may Cox and Thompson complain that the district court failed to pass on the validity of the classification orders. If there was error of the district court in failing to examine the files of the board to determine whether or not there was basis for their classification, it was cured in the Circuit Court of Appeals by that court's examination.

Petitioners do not limit themselves to the claim that directed verdicts should have been entered in their favor because of the invalidity of their classifications as a matter of law; they claim that the issue should have been submitted with appropriate instructions to the jury. The charge requested by Roisum that he be acquitted if the jury found that he was "erroneously" classified was improper. In *Estep v. United States* it was distinctly stated that mere error in a classification was insufficient grounds for attack. Cox and Thompson requested charges under which the jury would determine "whether or not the defendant is a minister of religion" without considering the action of the local board. We hold that

two-year interruption in his education, his return to the day session of the seminary in the month when his selective service questionnaire was returned, and the fact that the seminary in question was apparently not preparing men exclusively for the rabbinate, make questionable his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as a refuge for the duration of the war. Congress did not create the exemption in § 5 (d) for him. There was some evidence that this was Samuels' plan; and that evidence, coupled with his demeanor and attitude, might have seemed more persuasive to the boards than it does in the cold record. Our inquiry is ended when we are unable to say that the board flouted the command of Congress in denying Samuels the exemption."

* The Circuit Court of Appeals on April 5, 1946, ordered the judgments in these cases reversed on the ground that the jury should have passed on petitioners' claims. Upon rehearing the opinion was withdrawn, and on October 4 the court handed down an opinion affirming the judgments. In *Smith v. United States*, 157 F. 2d 176, the Circuit Court of Appeals held that the submission of the issue of classification to the jury constituted reversible error. But cf. *United States ex rel. Kulick v. Kennedy*, 157 F. 2d 811.

such a charge would also have been improper. Whether there was "no basis in fact" for the classification is not a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. *Yakus v. United States*, 321 U. S. 414. Although we held in *Estep* that Congress did not intend to cut off all judicial review of a selective service order, petitioners have full protection by having the issue submitted to the trial judge and the reviewing courts to determine whether there was any substantial basis for the classification order. When the judge determines that there was a basis in fact to support classification, the issue need not and should not be submitted to the jury. Perhaps a court or jury would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable "only if there is no basis in fact for the classification." *Estep v. United States*, *supra*, 122. Consequently when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders. Upon the judge's determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration.⁵

Petitioners also claim that they were denied the right to introduce new evidence at the trial to support their

⁵ For an analogous power of a judge as to admissibility, see Wigmore (3d ed.) § 2550; *Steele v. United States No. 2*, 267 U. S. 505, 510-11; *Ford v. United States*, 273 U. S. 593, 605; *Doe dem. Jenkins v. Davies*, 10 Ad. & El. N. S., 314, 323-24; Phipson, Evidence (8th ed.), p. 9.

contention that the orders were invalid. Roisum made no attempt to introduce such evidence, Cox was in fact allowed to testify as to his duties as a minister, and only Thompson was denied the opportunity so to testify. Thompson did not specify this point as error in his appeal to the Circuit Court of Appeals. Passing the possible waiver on the part of Thompson by failing to argue this point below, we hold that his contention is without merit. Petitioner claims that his status as a minister is a "jurisdictional fact" which may be determined *de novo* (reexamination of the record of the former hearing with right to adduce additional evidence) in a criminal trial, and relies on *Ng Fung Ho v. White*, 259 U. S. 276; where we held that an alleged alien was entitled to a judicial trial on the issue of alienage in *habeas corpus* proceedings. But that case is different from this. The alien, there, claimed American citizenship. As such, this Court said, he had a right to a judicial hearing of his claim as a matter of due process. This he could not get before the Commissioner of Immigration. Therefore, since the deportation of a citizen may involve loss "of all that makes life worth living," this Court decided that the "jurisdiction" of the Commissioner to try the alleged alien could be tested by *habeas corpus*. P. 284. That gave the alleged alien a judicial hearing. In these cases judicial review of administrative action is allowed in the criminal trial. This assures judicial consideration of a registrant's rights. Petitioners' objection on this point is in essence that the review is limited to evidence that appeared in the administrative proceeding. It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted.* As we have said else-

* See *Goff v. United States*, 135 F. 2d 610, and *United States v. Messersmith*, 138 F. 2d 599.

where the board records were made by petitioners. It was open to them there to furnish full information as to their activities. It is that record upon which the board acted and upon which the registrants' violation of orders must be predicated.

We perceive no error to petitioners' prejudice in the records.

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

SUPREME COURT OF THE UNITED STATES

Nos. 66-68.—OCTOBER TERM, 1947.

Wesley William Cox, Petitioner,

66

v.

The United States of America.

Theodore Romaine Thompson,
Petitioner,

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v.

The United States of America.

Wilbur Roisum; Petitioner,

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v.

The United States of America.

On Writs of Certiorari
to the United States
Circuit Court of
Appeals for the
Ninth Circuit.

[November 24, 1947.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK
concurring, dissenting.

I agree with the majority of the Court that we can reverse the judgments below only if there was no basis in fact for the classification. I also agree that that question is properly one of law for the Court. To that extent I join in the opinion of the Court. But I do not agree that the local boards had adequate basis to deny to petitioners the classification of ministers. My disagreement is required by what I conceive to be the mandate of Congress, that all who preach and teach their faith and are recognized as ministers within their religious group are entitled to the statutory exemption.

The exemption runs to "regular or duly ordained ministers of religion." There is no suggestion that only ministers of the more orthodox or conventional faiths are included. Nor did Congress make the availability of the exemption turn on the amount of time devoted to religious activity. It exempted all regular or duly or-

dained ministers. Hence, I think the Selective Service Regulations properly required that a "regular" minister, as distinguished from a "duly ordained" minister,¹ only be one who "customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." 32 C. F. R., Cum. Supp. § 622.44 (b).

It is not disputed that Jehovah's Witnesses constitute a religious sect or organization. We have, moreover, recognized that its door-to-door evangelism is as much religious activity as "worship in the churches and preaching from the pulpits." *Murdock v. Pennsylvania*, 319 U. S. 103, 109. The Selective Service files of these petitioners establish, I think, their status as ministers of that sect. Their claims to that status are supported by affidavits of their immediate superiors in the local group and by their national headquarters. And each of them was spending substantial time in the religious activity of preaching their faith. If a person is in fact engaging in the ministry, his motives for doing so are quite immaterial.²

¹A "duly ordained" minister is defined as one "who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties." 32 C. F. R. Cum. Supp. § 622.44 (c).

The distinction between "regular" and "duly ordained" ministers is, I think, more than the ordination of the latter. The "duly ordained" minister performs all the customary functions of a minister of a church. The concept of "regular" minister more nearly fits those who, like Jehovah's Witnesses, follow less orthodox or conventional practices.

²*Eagles v. Samuels*, 329 U. S. 304, is not controlling here. It involved the exemption given students preparing for the ministry. Mere presence in a school not exclusively confined to preparing men for the rabbinate did not entitle the student to exemption.

To deny these claimants their statutory exemption is to disregard these facts or to adopt a definition of minister which contracts the classification provided by Congress.

The classification as a minister may not be denied because the registrant devotes but a part of his time to religious activity. It is not uncommon for ordained ministers of more orthodox religions to work a full day in secular occupations, especially in rural communities. They are nonetheless ministers. Their status is determined not by the hours devoted to their parish but by their position as teachers of their faith. It should be no different when a religious organization such as Jehovah's Witnesses has part-time ministers. Financial needs may require that they devote a substantial portion of their time to lay occupations. And the use of part-time ministers may be dictated by a desire to disseminate more widely the religious views of the sect. Whatever the reason, these part-time ministers are vehicles for propagation of the faith; by practical as well as historical standards they are the apostles who perform the minister's function for this group.

SUPREME COURT OF THE UNITED STATES

Nos. 66-68.—OCTOBER TERM, 1947.

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On Writs of Certiorari
to the United States
Circuit Court of Ap-
peals for the Ninth
Circuit.

[November 24, 1947.]

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE concurs, dissenting.

With certain limitations, this Court has recognized that a person on trial for an alleged violation of the Selective Training and Service Act has the right to prove that the prosecution is based upon an invalid draft board classification. But care must be taken to preclude the review of the classification by standards which allow the judge to do little more than give automatic approval to the draft board's action. Otherwise the right to prove the invalidity of the classification is drained of much of its substance and the trial becomes a mere formality. Such empty procedure has serious connotations, especially when we deal with those who claim they have been illegally denied exemptions relating to conscientious beliefs or ministerial status.

Specifically, I object to the standard of review whereby the draft board classification is to be sustained unless there is no evidence to support it. Less than a substantial amount of evidence is thus permitted to legalize the clas-

sification. Whatever merit this standard may have in other situations, I question the propriety of its use in this particular setting. This differs from an ordinary civil proceeding to review a non-punitive order of an administrative agency, an order which is unrelated to freedom of conscience or religion. This is a criminal trial. It involves administrative action denying that the defendant has conscientious or religious scruples against war, or that he is a minister. His liberty and his reputation depend upon the validity of that action. If the draft board classification is held valid, he will be imprisoned or fined and will be branded as a violator of the nation's law; if that classification is unlawful, he is a free man. Moreover, he has had no previous opportunity to secure a judicial test of this administrative action, no chance to prove that he was denied his statutory rights. Everything is concentrated in the criminal proceeding.

These stakes are too high, in my opinion, to permit an inappreciable amount of supporting evidence to sanction a draft board classification. Since guilt or innocence centers on that classification, its validity should be established by something more forceful than a wisp of evidence or a speculative inference. Otherwise the defendant faces an almost impossible task in attempting to prove the illegality of the classification, the presence of a mere fragment of contrary evidence dooming his efforts. And such a scant foundation should not justify brushing aside bona fide claims of conscientious belief or ministerial status. If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding.

It is needless to add that, from my point of view, the proof in these cases falls far short of justifying the conviction of the petitioners. There is no suggestion in the record that they were other than bona fide ministers.

And the mere fact that they spent less than full time in ministerial activities affords no reasonable basis for implying a non-ministerial status. Congress must have intended to exempt from statutory duties those ministers who are forced to labor at secular jobs to earn a living as well as those who preach to more opulent congregations. Any other view would ascribe to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work, an intention that I am unwilling to impute. Accordingly, in the absence of more convincing evidence, I cannot agree that the draft board classifications underlying petitioners' convictions are valid.